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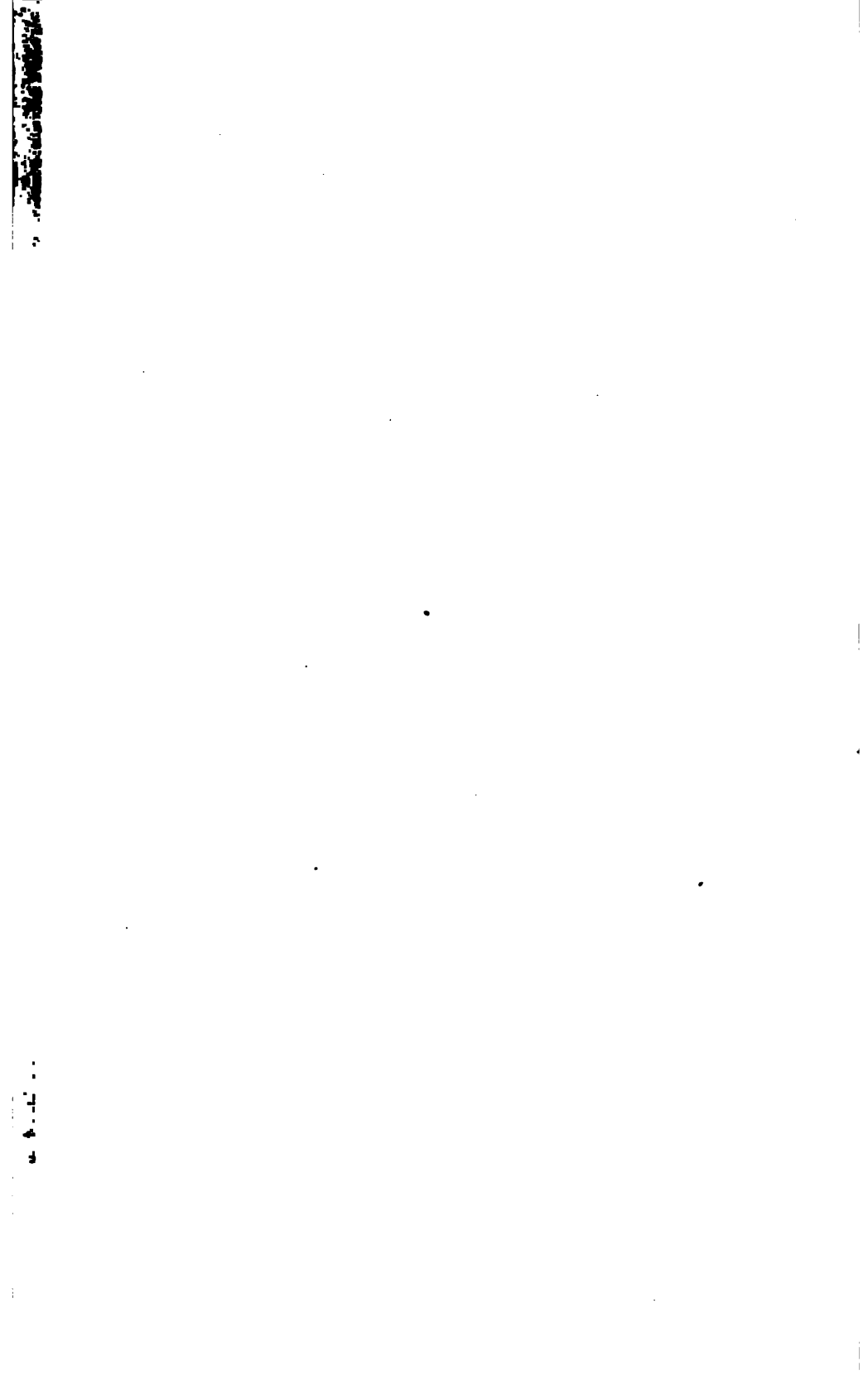
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REPORTS
OF
CASES,
DECIDED IN THE
Ch. B. Ct.
HIGH COURT OF CHANCERY,

BY
THE RIGHT HON. SIR JOHN LEACH,
Vice-Chancellor of England.

BY
NICHOLAS SIMONS AND JOHN STUART,
OF LINCOLN'S-INN ESQUIRES, BARRISTERS AT LAW.

VOL. I.
1822, 1823, 1824—2, 3, & 4 Geo. IV.

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Lord ELDON - - - - - **Lord Chancellor.**
Sir THOMAS PLUMER - - **Master of the Rolls.**
Sir JOHN LEACH - - - **Vice-Chancellor.**
Sir ROBERT GIFFORD - - - } **Attorneys General.**
Sir J. S. COPLEY - - - - }
Sir J. S. COPLEY - - - - } **Solicitors General.**
Sir CHARLES WETHERELL }

MEMORANDUM.

THE Decisions in the following Cases contained in this Volume have been appealed from, and the results are as follow :

Balfour v. Farquharson, <i>post.</i>	72	- Affirmed, 1 Turn.	184
Verlander v. Codd	94	- Affirmed, <i>ibid.</i>	94
Head v. Head	150	- Affirmed, <i>ibid.</i>	138
Adamson v. Hull	249	- Reversed, <i>ibid.</i>	258
Trim v. Baker	469	- Affirmed, <i>ibid.</i>	253
Parker v. Fairlie	295	- Affirmed.	

A

TABLE

OF

CASES REPORTED

IN THIS VOLUME.

	<i>Page</i>		<i>Page</i>
A.		Balfour v. Farquharson	- 72
ACTON v. White	- - - 429	Ball v. Storie	- - - 210
Adamson v. Blackstock	- - - 118	Ball, Gordon v.	- - - 178
Adamson v. Hull	- - - 249	Banbury Peerage Case	- - 153
Adderley v. Dixon	- - - 607	Banning, Coope v.	- - - 534
Alvin, Penington v.	- - - 264	Barclay v. Raine	- - - 449
Angell v. Angell	- - - 83	Barlee v. Barlee	- - - 100
Anson (Lord), Winter v.	- 434	Barlow, Nunn v.	- - - 588
Archer, Pratt v.	- - - 433	Barney v. Lockett	- - - 419
Ashburnham (Earl of), At-		Bayley v. Snelham	- - - 78
torney General v.	- - - 394	Beckford v. Kemble	- - - 7
Aspinall v. Petvin	- - - 544	Bell, Silcox v.	- - - 301
Aston, Johnson v.	- - - 73	Bescoby v. Pack	- - - 500
Atkins, Chambers v.	- - - 382	Bishop of London's Case	- 268
Attorney General v. Earl of		Black, Willis v.	- - - 525
Ashburnham	- - - 394	Blackstock, Adamson v.	- 118
		Bland v. Winter	- - - 246
B.		Bodenham, Harris v.	- - - 283
Bacon, Williams v.	- - - 415	Bold, Wynter v.	- - - 507
Baker, Trim v.	- - - 469	Boode, Cust v.	- - - 21
		Booth, Ibbotson v.	- - - 103

	<i>Page</i>		<i>Page</i>
Bowring, Wellman v. - -	24		
Bradley, Brookfield v. - -	23		
Brassington v. Brassington -	455		
Breton v. Lord Clifden - -	363		
Brookfield v. Bradley - -	23		
Bryson v. Whitehead - -	74		
Burney v. Morgan - -	358		
Bushell v. Bushell - -	164		
Butts v. Trower - -	181		
		D.	
		Davenport v. Davenport - -	101
		Davis, Williams v. - -	262
		Davis v. Getty - -	411
		Davis, Williams v. - -	262
		Davies, Williams v. - -	426
		Davies v. Wattier - -	463
		Dawson v. Sadler - -	537
		Dennett, Kirkpatrick v. -	408
		De Tastet, Harris v. - -	263
		Detillin v. Gale - -	275
		Dew v. Clarke - -	108
		Dixon, Adderley v. - -	607
		Dix v. Reed - -	237
		Doloret v. Rothschild - -	590
		Donegall (the Marquis of),	
		Houlditch v. - -	491
		Dorman, Hook v. - -	227
		Dowlin v. Macdougall - -	367
		Douglas, Rutherford v. - -	111
		Drummond, Grassick v. - -	517
		Duffield v. Elwes - -	239
		E.	
		Earl of Ashburnham, Attorney	
		General v. - -	394
		Eccles, Rowley v. - -	511
		Edwards, Garstone v. - -	20
		Elwes, Duffield v. - -	239
		Esdaile v. Stephenson - -	122
		Evans v. Hughes - -	185
		Evans, Worthington v. - -	165
C.			
Campbell v. Solomans - -	462		
Cann v. Cann - -	284		
Cann, Partridge v. - -	466		
Carlisle (Earl of), Palmer v. -	423		
Casamajor v. Strobe - -	381		
Chambers v. Atkins - -	382		
Chambers, Waters v. - -	225		
Clarke, Dew v. - -	108		
Clifden (Lord), Breton v. -	363		
Codd, Verlander v. - -	94		
Cole v. Fitzgerald - -	189		
Cooke, Hibbert v. - -	552		
Cooper, Renvoize v. - -	364		
Coope v. Banning - -	534		
Copner, Price v. - -	347		
Corbet v. Corbet - -	612		
Costs, Memorandum as to -	357		
Coster, Merest v. - -	486		
Cottle, Withy v. - -	174		
Court v. Jeffery - -	105		
Croucher, Jones v. - -	315		
Croxhall, Piggott v. - -	467		
Cust v. Boode - -	21		

TABLE OF CASES REPORTED.

vii

	Page		Page
F.		Harris v. Bodenham - - -	283
Farquharson, Balfour v. - - -	72	Harrison v. Hollins - - -	471
Fairlie, Parker v. - - -	295	Harrop, Thomas v. - - -	524
Fielden v. Fielden - - -	255	Harvey, Revett v. - - -	502
Fitzgerald, Cole v. - - -	189	Haworth, Jackson v. - - -	161
Folgham, Green v. - - -	398	Hawkins v. Shewen - - -	257
Ford v. Rawlins - - -	328	Haynes v. Littlefear - - -	496
Forster, Sidden v. - - -	335	Head v. Head - - -	150
Franklin, Houghton v. - - -	390	Heaton, Griffith v. - - -	271
Franklin, Wake v. - - -	95	Hescott, Lupton v. - - -	274
Friendly Society, in the mat- ter of a - - - - -	82	Hibbert v. Cooke - - -	552
Frith, Parker v. - - -	199	Hickman, Whitehouse v. - - -	102
G.		Hobson, Rist v. - - -	543
Gale, Detillin v. - - -	275	Hollins, Harrison v. - - -	471
Gallini, Pott v. - - -	206	Hony v. Honv - - -	568
Garstone v. Edwards - - -	20	Hook v. Dorman - - -	227
Garey v. Whittingham - - -	163	Hopkins v. Towle - - -	337
Getty, Davis v. - - -	411	Horwood v. West - - -	387
Glassington v. Thwaites - - -	124	Hoskins v. Lleyd - - -	393
Gordon v. Ball - - -	178	Houghton v. Franklin - - -	390
Gorton v. Smart - - -	66	Houlditch v. The Marquis of Donegall - - - - -	491
Grassick v. Drummond - - -	517	Howard v. Wright - - -	190
Green v. Otte - - -	250	Hull, Adamson v. - - -	249
Green v. Thomson - - -	121	Hull, Praed v. - - -	331
Green v. Folgham - - -	398	Hughes v. Evans - - -	185
Griffith, Wynne v. - - -	147	Hutchinson, Warter v. - - -	276
Griffith v. Heaton - - -	271	I.	
H.		Ibbotson v. Booth - - -	103
Haig v. Swiney - - -	487	Irvine v. Young - - -	333
Harris v. De Tastet - - -	263	Ivatt, Sparke v. - - -	366

	Page		Page
J.		Marriott v. White - - -	17
Jackson v. Haworth - - -	161	Marshall v. The Corporation	
James v. Sadgrove - - -	4	of Queenborough - - -	520
Jamson, Vezey v. - - -	69	Mayhew, Waters v. - - -	220
Jeffery, Court v. - - -	105	Memorandum as to Costs -	357
Johnson v. Aston - - -	73	Mellish v. Mellish - - -	138
Jones v. Mitchell - - -	290	Mercer, Lyon v. - - -	356
Jones v. Croucher - - -	315	Merest v. Coster - - -	486
Jones, Wellbeloved v. - -	40	Mitchell, Jones v. - - -	290
		Moir v. Mudie - - -	282
K.		Moore, Knye v. - - -	61
Keene, Price v. - - -	98	Morgan v. Burney - - -	358
Kemble, Beckford v. - -	7	Mudie, Moir v. - - -	282
Kirkpatrick v. Dennett -	408	Mudie, Wright v. - - -	266
Knye v. Moore - - -	61	Murney, Sanders v. - - -	225
L.		N.	
Landon v. Ready - - -	44	Naylor v. Winch - - -	555
Langley v. Sneyd - - -	45	Northey v. Pearce - - -	420
Levi v. Ward - - -	334	Nunn v. Barlow - - -	588
Lingen v. Simpson - - -	600		
Linton, Trollope v. - - -	477	O.	
Littlefear, Haynes v. - -	496	O'Brien, Whyte v. - - -	551
Lloyd, Hoskins v. - - -	393	Otte, Green v. - - -	250
Loomes v. Stotherd - - -	458		
Lord Anson, Winter v. - -	434	P.	
Lupton v. Hescott - - -	274	Packwood v. Maddison - -	232
Luckett, Barney v. - - -	419	Pack, Bescoby v. - - -	500
Lyon v. Mercer - - -	356	Palmer v. the Earl of Carlisle	423
Lysaght, Whittuck v. - -	446	Parker v. Frith - - -	199
		Parker v. Fairlie - - -	295
M.		Parry v. Wright - - -	369
Macdougall, Dowlin v. - -	367	Partridge v. Cann - - -	466
Macklew, Pitt v. - - -	136	Pearce, Northey v. - - -	420
Maddison, Packwood v. - -	232	Pennington v. Alvin - - -	264
Manning v. Thesiger - - -	106		
Manning, Watts v. - - -	421		

TABLE OF CASES REPORTED.

ix

	Page		Page
Petvin, Aspinall v. - - -	544	Sanders v. Muruey - - -	225
Piggott v. Croxhall - - -	467	Sayers v. Walond - - -	97
Pitt v. Macklew - - -	136	Shewen, Hawkins v. - - -	257
Pott v. Gallini - - -	206	Sidden v. Forster - - -	335
Praed v. Hull - - -	331	Silcox v. Bell - - -	301
Prankerd v. Prankerd - - -	1	Simpson, Lingen v. - - -	600
Pratt v. Archer - - -	433	Solomans, Campbell v. - -	462
Price v. Copner - - -	347	Smart, Gorton v. - - -	66
Price v. Price - - -	386	Smith, Swayne v. - - -	56
Price, Williams v. - - -	581	Smith, Wigsell v. - - -	321
Price, Keene v. - - -	98	Smith, Roberts v. - - -	513
		Snelham, Bayley v. - - -	78
Q.		Sneyd, Langley v. - - -	45
Queenborough (the Corpora-		Sparke v. Ivatt - - -	366
tion of) Marshall v. - - -	520	Stephenson, Esdaile v. - -	122
		Storie, Ball v. - - -	210
R.		Stotherd, Loomes v. - - -	458
Rackstraw v. Vile - - -	604	Strode, Casamajor v. - - -	381
Raine, Barclay v. - - -	449	Swayne v. Smith - - -	56
Rawlins, Ford v. - - -	328	Swiney, Haig v. - - -	487
Ready, Landon v. - - -	44		
Reed, Dix v. - - -	237	T.	
Renvoize v. Cooper - - -	364	Teale v. Teale - - -	385
Revett v. Harvey - - -	502	Temple, Waite v. - - -	319
Rist v. Hobson - - -	543	Thesiger, Manning v. - - -	106
Roberts v. Roberts - - -	39	Thompson, Green v. - - -	121
Roberts v. Smith - - -	513	Thomas v. Harrop - - -	524
Robinson, Turner v. - - -	3	Threlfall, Webster v. - - -	135
Robinson, Turner v. - - -	313	Thwaites, Glassington v. -	124
Rothschild, Doloret v. - -	590	Towle v. Hopkins - - -	337
Rowley v. Eccles - - -	511	Trigg v. Trigg - - -	274
Rutherford v. Douglas - - -	111	Trim v. Baker - - -	469
		Trollope v. Linton - - -	477
S.		Trower v. Butts - - -	181
Sadgrove, James v. - - -	4	Turner v. Robinson - - -	3
Sadler, Dawson v. - - -	537	Turner v. Robinson - - -	313
VOL. 1.		b	

	<i>Page</i>		<i>Page</i>
V.		White, Acton v.	429
Verlander v. Codd - - -	94	Whitehouse v. Hickman -	102
Vezey v. Jamson - - -	69	Whittingham, Garey v. -	163
Vile, Rackstraw v. - - -	604	Whittuck v. Lysaght - -	446
		Whyte v. O'Brien - -	551
W.		Wigsell v. Smith - - -	321
Walond, Sayers v. - - -	97	Williams v. Bacon - - -	415
Waite v. Temple - - -	319	Williams v. Price - - -	581
Wake v. Franklin - - -	95	Williams v. Davis - - -	262
Ward, Levi v. - - -	334	Williams v. Davies - - -	426
Warner, Wheeler v. - - -	304	Willis v. Black - - -	525
Warter v. Hutchinson - -	276	Winch, Naylor v. - - -	555
Waters v. Chambers - - -	225	Winter v. Lord Anson - -	434
Waters v. Mayhew - - -	220	Winter, Bland v. - - -	246
Wattier, Davies v. - - -	463	Withy v. Cottle - - -	174
Watts v. Manning - - -	421	Worthington v. Evans - -	165
Webber v. Webber - - -	311	Wright v. Howard - - -	190
Webster v. Threlfall - -	135	Wright v. Mudie - - -	266
Wellman v. Bowring - - -	24	Wright, Parry v. - - -	369
Wellbeloved v. Jones - -	40	Wynne v. Griffith - - -	147
West, Horwood v. - - -	387	Wynter v. Bold - - -	507
Wharton v. Wharton - -	235		
Wheeler v. Warner - - -	304	Y.	
Whitehead, Bryson v. - -	74	Young, Irvine v. - - -	333
White, Marriott v. - - -	17		

CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

PRANKERD v. PRANKERD.

1820.

17th March.

BY the Custom of the Manor of *Blendon* with *Priddie*, in the County of *Somerset*, Copyhold Lands, held of the Manor, are granted to Four Persons for their Lives successively, as they are named in the Grant; and the Grantee in Possession is enabled, by surrendering all his Estate in Possession, Reversion, and Remainder, to pass his own Estate, and also the Estates in Reversion or Remainder expectant thereupon.

Advancement.

In the Year 1794, the Plaintiff was seised in Possession of a Copyhold Estate held of this Manor, for his Life; and his two Daughters, *Mary Prankerd* and *Louisa Prankerd*, were seised of the same Estate for their Lives in Remainder successively.

A Tenant in possession of Copyholds, grantable for Lives, procured, at his own Expense, a Grant of it to his Son in Remainder, and at the same time surrendered it to the use of his will: Held, that the Son was not entitled to the Estates so granted to him by way of Advancement, but was a Trustee for his Father.

The Defendant was the Son of the Plaintiff; and, at a Court held in December 1794, the Plaintiff procured

VOL. I. B

1820.

FRANKERD
v.
FRANKERD.

a Grant of the Estate to be made to the Defendant for his Life, in Remainder expectant upon the determination of the Estates of the Plaintiff and his two Daughters, and paid to the Lord the Fine of 130 l. for this Grant; and, at the same Court, he surrendered all his Estate and Interest in the Premises, during his own Life, and the Lives of his two Daughters, and the Defendant, to the use of his Will.

The Plaintiff's Daughters having died, the Defendant claimed, under this Grant, to be entitled to the Premises upon the determination of the Plaintiff's Estate, for his own use, by way of Advancement made to him by the Plaintiff, his Father.

In consequence of this claim this Suit was instituted, for the purpose of having it declared by the Court, that the Defendant held the Premises under the Grant, in Trust for the Plaintiff, and of having a Declaration of Trust executed by him to that effect.

Mr. Bell, and Mr. Simons, for the Plaintiff, said it was now settled, that if a Father purchases an Estate in the Name of a Child, it is, *prima facie*, an Advancement for the Child; but that, if the Father, at the time of the Grant, does any Act, showing that he meant the Purchase to be for his own Benefit, the Child would be a Trustee for the Father; and they contended that the Surrender in this case, made by the Plaintiff to the use of his Will, was a sufficient declaration of such intention; and they cited, *Dyer v. Dyer* (a), *Finch v. Finch* (b), and *Murless v. Franklin* (c).

(a) 2 Cox, 92; and 2 Wats. Copyh. 216.

(b) 15 Ves. 43. (c) 1 Swanst. 13.

CASES IN CHANCERY.

3

Mr. Heald, and Mr. Bickersteth, for the Defendant.

1820.

The *Vice-Chancellor* said, that as the Plaintiff had surrendered the Estate to the use of his Will, it was clear he meant it to remain at his own disposal, and not to be an Advancement for the Defendant; and that, as the Surrender was contemporaneous with the Grant, the Defendant ought to be declared a Trustee of the Interest which he took under the Grant, for the Plaintiff; and he decreed accordingly; but refused to give the Plaintiff his Costs.

PRANKERD

v.

PRANKERD.

TURNER and Others v. ROBINSON and Others.

1821.

27th March.

IN Trinity Term 1820, the Plaintiffs being entitled to certain Shares of the Residuary Personal Estate of *William Woolcott*, deceased, filed their Bill against his personal Representatives, and the other Residuary Legatees, for an Account of Personal Estate, and to have their Shares of the Residue ascertained and paid.

Plea.

On the 28th of September 1820, a Commission of Bankrupt issued against *Charles Frederick Woolcott*, one of the Residuary Legatees, and one of the Defendants in this Case.

A Plea of Bankruptcy is good notwithstanding the Commission issued after the filing of the Bill.

Matters which arise after the filing of the Bill may be pleaded; by analogy to the Rule at Law.

He therefore pleaded his Bankruptcy.

Mr. Roots, for the Plaintiffs, insisted that the Plea was bad, because the Bankruptcy took place after the Bill had been filed.

1821.

TURNER
and others,
v.
ROBINSON
and others.

Mr. *Simons*, for the Defendant, replied that it was no objection to a Plea that the Matter pleaded had occurred after the filing of the Bill; and that a Release of the subject of the Suit, though it was executed after the filing of the Bill, might be pleaded to the Bill.

The *Vice-Chancellor* said, that where the Decree sought is *ad rem*, and not a personal Demand, the Bankruptcy of the Defendant is a good Plea, because all interest in the subject is transferred from the Bankrupt to his Assignees; and that as any matter which arises between the Declaration and Plea may be pleaded at Law, so matters which arise between the Bill and Plea may be pleaded in Equity.

Plea allowed.

1822.

2d & 4th
November.

Macgregor v. S. Ind Co 2 Ser - 654

Plea and Answer.

JAMES v. SADGROVE.

Plea to all the relief, and all the discovery, except certain Interrogatories, accompanied with an Answer to these Interrogatories, which did not go to any material point, over-ruled.

Aliter, if the Answer had been to matter which would have repelled the Defence by Plea.

THE Bill stated, that *John Norman* and *Thomas Humphrey*, deceased, were in 1813 Joint-owners of a Ship: That, on the 2d of March 1813, a Settlement of Accounts relating to this Ship took place between them, when a Balance of 521*l.* 6*s.* 6*d.* was found due from *Humphrey* to *Norman*, and in order to pay that Balance, three Bills of Exchange, all dated the 2d of March, were drawn upon *Humphrey* by *Norman*, and accepted by the former; the first payable Two Months, the second Five Months, and the third Six Months after date: That the first was paid when due, but before the second and third became due *Humphrey* died: That *Humphrey* made his Will, dated the 5th of July 1813, and appointed *Driver* and *Sadgrove*

his Executors : That on the 30th of July *Sadgrove* alone proved the Will, and possessed the Personal Estate : " That when the second and third Bills became due, " they were presented for payment by *Norman*, who was " informed by *Sadgrove* that he had no Assets of the " Testator in his hands, and that he could not pay the " Bills : That *Norman* waited for some time in expectation that *Sadgrove* might possess Assets to enable " him to pay these two Bills, but he was unable to " discover that *Sadgrove* was in possession of such " Assets ; and that *Norman* (who was Master of a Merchant Vessel trading to Foreign Parts) left this Country, and was chiefly in Foreign Parts beyond Sea, " until the year 1820."

1822.

JAMES
v.
SADGROVE.

The Bill prayed an Account of the Personal Estate possessed by *Sadgrove*, and that it might be applied in a course of Administration.

To this Bill the Defendant *Sadgrove* put in a Plea and Answer. The Plea was expressed as follows : " To all the discovery and relief sought for or prayed against this Defendant, except such parts of the said Bill as seek a Discovery, whether," &c. It then set forth the Interrogatories to those Statements in the Bill which are included in inverted commas ; after which came the Plea of the Statute of Limitations in the usual manner ; and then followed an Answer to the excepted Interrogatories.

Mr. *Lovat*, in support of this Plea, contended that, although it was settled that a Plea to Relief covers the Discovery, a Defendant might, if he pleased, give the Discovery and plead to the Relief, without over-ruling his Plea. *Hodgkin v. Longden* (a); *Todd v. Gee* (b).

(a) 2 Ves. jun. 2.

(b) 17 Ves. 274 & 277.

1822.

JAMES
v.
SADGROVE.

A fortiori, if he expressly save to himself the right of answering a particular part of the Bill he does not over-rule his Plea.

Mr. Parker, *contra*.

The VICE-CHANCELLOR:—

The Authorities cited do not touch the present Case. Admitting that a Defendant may at his pleasure answer the whole Bill, though he pleads to the Relief, it does not follow from thence that he may plead to the Relief and to a part of the Discovery only, and at his pleasure answer the rest of the Bill. Such a partial Answer can serve no useful purpose; and the Rule applies here, that he who submits to answer at all, must answer fully. If the Statute protects the Defendant from a part of the Discovery, it protects him from the whole Discovery, and the partial Answer over-rules the Plea (c).

4th November.

Where there is matter charged by the Bill which goes to repel the Defence by Plea, the Plea must be supported by an Answer to that matter.

The *Vice-Chancellor*, referring to this Case, said there were possible cases in which a Plea to the Relief and a part of the Discovery might be supported: that if, for instance, facts were stated in a Bill for the purpose of taking the Case out of the Statute of Limitations, the Defendant would be bound to answer as to such facts, though he pleaded to the Relief and the rest of the Discovery; but that such was not the nature of the Case in question (d).

(c) *Blacket v. Langlands*, 1 Anstr. 14, seems to have been decided on the same principle with this Case, but is imperfectly reported. See also *Morrison v. Turnour*, 18 Ves. 175; *Hepard v. Duppa*, 1 V. & B. 511; *Bowers v. Cater*, 4 Ves. 91; *Bayley v. Adams*, 6 Ves. 586, &c.

(d) "Where a particular special Promise is charged, to avoid the operation of the Statute, the Defendant must deny the Promise charged, by averment in the Plea, as well as by Answer, to support the Plea." *Mif. 419*. 3d edit. See *Whitbread v. Brockhurst*, 1 Bro. C. C. 404. See also *Anon.* 3 Atk. 70.

SUSANNAH HYDE BECKFORD v. KEMBLE
and Others.

1822.
4th November.

THE Court was moved, on Behalf of the Plaintiff, for an Injunction to restrain the Defendants, *Atkins, Mavor, and Samuda*, from all Proceedings in a Suit instituted by them in the Court of Chancery, in *Jamaica*, against the Plaintiff; and from all other Proceedings in the said Court against the Plaintiff, for Foreclosure and Sale of the Plantations and Premises in question in this Cause.

Jurisdiction.

Injunction (on Terms) granted to restrain Mortgagees of a *West India Estate* from proceeding on a Bill of Foreclosure in the Colonial Court, filed after a Decree made in this Court, which directed an Inquiry to ascertain the Amount of the Mortgage Debt, on a Bill to redeem; all Parties being in this Country.

The ground of this Application was, that these Defendants had instituted the Suit for Foreclosure in the Colonial Court, after the Decree in this Cause, which directed certain Accounts to be taken, for the purpose of ascertaining the Amount of the Mortgage Debts, with a view to Redemption.

Query, Whether the Mortgagees of a *Jamaica Estate*, on a Bill of Foreclosure in this Court, is entitled to a Decree for sale of the Estate, according to the Law of the Colony?

In the Month of June 1818, the Plaintiff filed her original Bill in this Cause, which prayed, amongst other things, that Accounts might be taken, in order to ascertain how much was justly due on the Mortgages, and that the Plaintiff might be let in to redeem.

The Plantations and Estates in question, (which are situated in *Jamaica*;) were, by Indentures of Lease Release and Settlement, dated the 28th and 19th March 1768, and made on the occasion of the Marriage of *Nathaniel Beckford and Elizabeth* his Wife, (the Father and Mother of the Plaintiff) conveyed to Trustees, for the Term of Ninety-nine Years, if *Nathaniel Beckford and Elizabeth* his Wife should so long live, upon Trust, to secure 300 l. a Year out of the Rents and Profits, to the separate use of the Wife; and to permit and suffer

1822.

BECKFORD

v.

KEMBLE
and others.

Nathaniel Beckford and his Assigns to receive the Residue of the Rents and Profits for his Life:—*Remainder* to the Use of *Elizabeth Beckford* for Life:—*Remainder* to the Use of Trustees to preserve contingent Remainders:—*Remainder* to the Use of the Children of the Marriage, in such Shares as *N. Beckford* and *Elizabeth* his Wife, or the Survivor of them, should appoint:—*Remainder* (in default of Appointment) to the Use and Behoof of all such Children as Tenants in Common in Tail, and if but one Child, to such only Child in Tail:

With divers Remainders over.

This Deed contained a Proviso, by which Mr. and Mrs. *Beckford* were empowered, during their joint Lives, to subject and make liable all the Premises therein comprised, to the Payment of any Sums of Money, not exceeding the Amount of the Principal Money due on the Incumbrances then charged on and affecting the said Plantations and Premises, for the purpose of paying off such Incumbrances, and also the further Sum of 4,000 l. Sterling.

The amount of the Incumbrances then affecting the Property was not stated in this Deed.

Under this Power, Mr. and Mrs. *Beckford*, by two Indentures, dated the 24th of February 1789 and the 16th of June in the same year, demised these Plantations, for two terms of 500 years each, by way of Mortgage, for securing the Sums of 6,000 l. and 6,700 l. Sterling, and Interest.

In November 1779, they conveyed their Life Interest in the Estates to *Richard Beckford* and *Rice James*, by

way of Mortgage, for securing the Sum of 17,000*l.* Currency, and Interest.

1822.

BECKFORD

v.

KEMBLE

and others.

In the month of July 1787, the Mortgages for 6,000*l.* and 6,700*l.* having become vested in *John Beckford*, *Richard Beckford*, and *Rice James*, these Persons filed their Bill in the Court of Chancery in *Jamaica*, against *N. Beckford* and *Elizabeth* his Wife, and also against the Plaintiff in this Cause, (who was then an Infant,) praying that an Account might be taken of how much was due for Principal Money and Interest in respect of these several Mortgages, and that the same might be paid, or in default thereof that the said Plantations and Estates might be sold.

The Court in *Jamaica*, soon afterwards, on a Petition (by the Plaintiffs there) appointed *N. Beckford* to be Receiver of the Rents and Profits of the Plantations, and directed him, in that capacity, to pay the Annuity of 300*l.* out of the Rents and Profits, to the separate use of his Wife *Elizabeth*, and also a Sum of 150*l.* for the maintenance of *Susannah Hyde Beckford* (the Plaintiff in this Cause), then an Infant.

John Beckford assigned all his interest in the Mortgages to *Richard Beckford* and *Rice James*.

Before May 1791, *Richard Beckford* and *Rice James* (who were Copartners in Trade) conveyed all their interest in the said several Mortgages for 6,000*l.*, 6,700*l.* and 17,000*l.*, to Trustees, for the benefit of their Creditors.

On the 9th May 1791, these Trustees filed their Supplemental Bill in the Court of Chancery in *Jamaica*, to

1822.

BECKFORD

v.

KEMBLE
and others.

have the benefit of the Proceedings in the former Suit there.

Afterwards, with a view to prevent further Litigation in the Suit in *Jamaica*, it was agreed between the several Parties to that Suit (except the Plaintiff in this Cause, then an Infant,) that an Order should be forthwith made, by consent in the Cause, to the effect after mentioned: *And that, upon the passing of such Order all further Proceedings in the said Suit should cease, except so far as they related to carrying into execution and giving effect to the said Order and Agreement, and such further Proceedings as might be had in the said Cause by the Consent of the Parties thereto.*

Pursuant to this Agreement an Order was made by the Court of Chancery in *Jamaica*, dated 28th January 1792, whereby it was directed that a new Receiver should be appointed, who should pay to *Nathaniel Beckford*, out of the Rents and Profits of the Plantations and Estates yearly, during the joint Lives of himself and *Elizabeth* his Wife, the Sum of 600 *l.* Sterling, in lieu of the said annual Sums of 300 *l.* and 150 *l.* theretofore paid to them.

A Receiver was appointed under this Order, and this annual Sum of 600 *l.* was paid to *Nathaniel Beckford* during his Life-time.

The Partnership between *Richard Beckford* and *Rice James* was afterwards dissolved, and on that occasion a Provision was made for the Debt of the Partnership, and the Trusts of the Conveyance to the Trustees for their Creditors, ceased.

In 1796 *Richard Beckford* died, and the several Mortgages for 6,000 *l.* 6,700 *l.* and 17,000 *l.* became ultimately vested in the Defendants, *Kemble, Atkins, Mavor*, and *Samuda*, as Assignees of Bankrupts.

1822.
 BECKFORD
 v.
 KEMBLE
 and others.

In 1810 *Nathaniel Beckford* died, and in 1814 *Elizabeth Beckford* also died, without having executed any Appointment under the Power reserved in the Deed of 19th March 1768.

The Plaintiff, as the only Child of the Marriage, became thereupon, under the Settlement of 19th March 1768, entitled to the Equity of Redemption.

Elizabeth Beckford, from the time of the Death of her Husband, by virtue of an Order of the Court of Chancery in *Jamaica*, received out of the Rents and Profits, the yearly Sum of 300 *l.*; and the Plaintiff a yearly Sum of 150 *l.*

The Plantations and Estates were now in the Possession of *Milne* and *Hamilton*, who, as the Attornies of the Mortgagees, had, by an Order of the Court of Chancery in *Jamaica*, dated 29th September 1813, been appointed Receivers.

The Mortgage for 17,000 *l.* of course ceased on the Death of *Elizabeth Beckford*, and the several subsisting Mortgages were vested in the several Defendants.

The Plaintiff, by this Bill, charged that the Mortgages for 6,000 *l.* and 6,700 *l.* (independent of the Mortgage for 17,000 *l.*) greatly exceeded the amount of the Incumbrances subsisting on the Plantations and Estates at the time when the Indenture of

1822.

BECKFORD

v.

KEMBLE
and others.

19th March 1768 was executed, and that the Monies produced by the Consignments of the Produce of the Estates had been misapplied.

The Defendants, *Kemble, Atkins, Mavor and Samuda*, by their Answer, stated, that in *May* 1814, the Plaintiff presented a Petition to the Court of Chancery in *Jamaica*, in the Cause there, praying for an adequate Annual Allowance out of the Rents and Profits of the Estates; and that, by an Order of that Court, dated 2d June 1814, it was directed that the Annual Sum of 350 *l.* Sterling, in addition to the former Allowance of 150 *l.* should be made to the Plaintiff, out of the Rents and Profits; but that they (the Defendants) had appealed against this Order to the King in Council.

They also submitted, by their Answer, whether the Plaintiff was entitled to prosecute this Suit, so far as respected the object of the Proceedings which had already taken place in *Jamaica*, or so far as she was entitled to relief in the Suit pending in that Island.

On the 10th February 1821, this Cause came on to be heard before the *Vice-Chancellor*, when his Honor made a Decree, referring it to the *Master* to inquire and state to the Court what was the amount of the Principal Money due on the Incumbrances charged on or affecting the Estates in question in this Cause at the date of the Indenture of Settlement dated 19th March 1768; and whether any, and which, of such Incumbrances, or any and what part thereof, had been discharged; and also to inquire and state to the Court what sums of Money had been charged on the Inheritance of the said Estates under the alleged authority of the Power contained in the Indenture of Settlement;

and whether any, and which, of the said sums of Money, or any and what part thereof respectively, had been since paid off and discharged, with liberty to the *Master* to state any special Circumstances; reserving further Directions, and Costs.

1822.
BECKFORD
v.
KEMBLE
and others.

On the 22d July 1822, the Bill of Revivor and Supplement in this Cause was filed, which stated that the Defendants, *Atkins, Mavor, and Samuda*, had, since the Decree in this Cause, instituted a Suit against the Plaintiff, in the Court of Chancery in *Jamaica*, for Foreclosure and Sale of the Plantations and Estates; and that they threatened to proceed as speedily as possible to obtain such Foreclosure and Sale. The Plaintiff therefore prayed an Injunction to restrain them from proceeding in the Suit in *Jamaica*.

Mr. *Bell*, and Mr. *Wyatt*, in support of the Motion for an Injunction:—

The Plaintiff having filed her Bill in this Court for a Redemption; and the Court having made a Decree on that Bill, it is an unreasonable vexation in the Defendants to proceed in the Colonial Court, where a different Decree may be obtained. If this be permitted, it must interfere with the proceedings of this Court. Can this Court permit the Defendants to proceed under such circumstances, and to frustrate, or render nugatory all that has been done here in this Cause? The Parties against whom the Injunction is sought are all residing within the Jurisdiction of this Court, and there can be no doubt that there is authority in the Court to grant such an Injunction. In *Fowler's Exchequer Practice* (c), it is laid down that the Court of Exchequer

(c) 1 Fowl. Exch. Prac. 270.

1822.
 BECKFORD
 v.
 KEMBLIN
 and others.

can grant an Injunction to restrain a Defendant from proceeding in a Suit in the Court of Chancery, respecting the same matters, after a Suit instituted in the Exchequer; and the form of such an Injunction is given. This is good Law, notwithstanding the case of *Lord Newbury v. Wren* (f), in which, however, no Decree had been made in the Suit for Redemption.

Mr. *Hart*, and Mr. *Pepys*, for the Defendants, made the following objections :—

I. There is no Rule more invariable than that a Mortgagee is entitled to use all his remedies, however multifarious, and however vexatious. He may imprison the Mortgagor in an Action on the Bond; he may bring an Ejectment to recover Possession of the Estate; and he may file his Bill for a Foreclosure of the Equity of Redemption, all at the same time.

II. Even if it were a rule, that after a Decree for Redemption, the Mortgagee should not be allowed to file a Bill for Foreclosure, yet that does not apply to the present Case. Here there has been no Decree for Redemption, but only for an Account.

III. Suppose it should happen, under this Decree, that the Master should report a Sum to be due to the Mortgagees greater than the Value of the Estate, the Plaintiff of course would not then take a Decree for Redemption, nor proceed farther in this Suit; and

(f) 1 Vern. 220. It was held there, by the Lord Keeper *Gifford*, that the Defendant to a Bill for Redemption in the Exchequer might file a Bill to Foreclose in Chancery; and that the Defendant in the latter Suit could not plead the prior Suit in the Exchequer. In that Case no Decree had been made in the Exchequer, though it appears the Defendant there had put in his Answer. See *Joy v. Bruin*, 1 Eq. Abr. 135.

the Defendants could not compel her to proceed in it. There would be no alternative but to endeavour to procure this Bill to be dismissed. The Court would not certainly so far defeat a Mortgagee of his just rights.

1822.

BECKFORD
v.
KEMBLE
and others.

IV. As to the question of the Priority of the Suits, that in which the Defendants are proceeding in *Jamaica* has clearly the Priority. It was begun in 1787, and has ever since been kept alive; and the Bill on which it is sought now to restrain them from proceeding is a Supplemental Bill in that Cause.

The *Vice-Chancellor* doubted whether he could make the Order, without qualification, because it appeared to him that the Foreclosure, which would be the result of the Suit in this Court if the Plaintiff did not redeem, would not be so beneficial to the Defendants as the Decree in their own Suit; for that in their own Suit they would be entitled to a Decree for the Sale of the Estate.

Mr. *Bell* said, there were Cases in which this Court, noticing the Law of *Jamaica*, had, upon Foreclosure, decreed a Sale of the Estate in the *West Indies*.

Query, Whether the Mortgagee of a *Jamaica* Estate is entitled, on a Bill of Foreclosure in this Court, to a Decree for Sale of the Estate according to the Laws of the Colony?

THE VICE-CHANCELLOR :—

All the Parties are in *England*; and it is plain therefore that the Accounts can much more conveniently, as well as more satisfactorily, be taken here than in *Jamaica*. It appears to me that the Plaintiff in this Court has a clear Equity to be protected against a Double Account of the Amount due on the Mortgages. I shall therefore make an Order to restrain the Defendants from proceeding in *Jamaica* until the further Order of this Court, with liberty to the Defendants to make such

1822.

BECKFORD

v.

KEMBLE
and others.

application as they shall be advised, with respect to the *Jamaica* Cause, after the *Master* shall have made his Report here; the Plaintiff in this Cause undertaking to consent to such Order or Orders in the Court in *Jamaica* as this Court shall think reasonable (g).

The following is the Order pronounced :—

“ This Court doth order that the Defendants, *John Atkins*, *John Mavor*, and *David Samuda*, be restrained, by the Injunction of this Court, from any further Proceeding in the Supplemental Suit in the Pleadings mentioned, instituted by the Defendants in the Court of Chancery in the Island of *Jamaica*, until the further Order of this Court, with liberty for the said Defendants to make such application to this Court as they shall be advised, with respect to such Suit in *Jamaica*, after the said *Master* shall have made his Report in this Cause, under the Order made in this Cause the 10th day of February 1821; the Plaintiff, by her Counsel, undertaking to consent to any Order to be made in the said Suit in *Jamaica*, which this Court shall at any time think reasonable.”

Reg. Lib. 1822; B. 2453.

(g) See *Harrison v. Gurney*, 2 J. & W. 563; *Bushby v. Munday*, 5 Madd. 297; and *Elliott v. Lord Minto*, 6 Madd. 16. as to the principle on which this Court acts in cases where Proceedings were instituted by the same Parties as to the same subject-matter in a Foreign Court. In the two first Cases, this Court granted an Injunction to restrain the Proceedings in the Foreign Court.

RICHARD MARRIOTT, and JULIA ANN
MARRIOTT, Infants, by *W. Pallett*, their next
Friend - - - - - Plaintiffs;

AND

RICHARD WHITE, R. ANDREWS, and Sir JOHN
CHANDOS READ, - - - Defendants.

1822.
5th November.

Practice.

IN 1802, *John Pettit* sold and conveyed to *John Marriott* and *Richard Marriott*, deceased, the Manor of *Abbott's Hall* in the County of *Essex*, and certain other Hereditaments, situate in *Stratford* in the same County, and received the Purchase-money. But some doubts existing as to the Title to Part of the Premises, *Pettit*, by an Indenture, dated the 26th March 1802, assigned another Estate, situate in *Hemstead* and *Steeple Bumpstead*, in the County of *Essex*, to one *Baxter*, for the Remainder of Two Terms of Years, upon certain Trusts, for indemnifying the *Marriotts* against any Claim which might be made to the Property sold to them, within Twenty Years from the date of the Indenture; and, at the expiration of that time, upon Trust, at *Pettit's* Expense, to re-assign the Estate comprised in that Indenture, to *Pettit*, his Executors, Administrators, and Assigns.

A Person who is not a Party to a Cause may present a Petition in the Cause to have Deeds belonging to him, which had been brought into the Master's Office under the usual direction in the Decree, delivered out to him.

Pettit delivered this Indenture, and several other Deeds and Writings relating to the Title to the Premises in *Hemstead* and *Steeple Bumpstead*, to *Baxter*; and *Baxter* deposited them with the *Marriotts*, and afterwards died.

1822.

MARRIOTT
v.
WHITE
and others.

John Marriott died in 1808, having devised and bequeathed all his Real and Personal Estate to *Richard Marriott*, upon certain Trusts, for the benefit of the Plaintiffs, and appointed *Richard Marriott* his Executor.

Richard Marriott died in 1813, having appointed the Defendants, *White* and *Andrews*, his Executors.

By the Decree made on the hearing of this Cause in June 1818, it was referred to the *Master* to take an Account of the Personal Estates, and of the Rents and Profits of the Real Estates of the two *Marriotts*; and, for the better taking of those Accounts, the Parties were to produce before the *Master* all Deeds, Papers, and Writings, in their custody or power relating thereto.

In pursuance of this Decree, *White* and *Andrews* deposited in the *Master's* Office all the Deeds and Writings that had come into their hands, as the Personal Representatives of the *Marriotts*; and amongst them, the Deeds and Writings relating to the Title to the Premises at *Hemstead* and *Steeple Bumpstead*.

Pettit, *Rist*, and *French*, presented a Petition in this Cause, stating that *Pettit* had sold those Premises to *Rist* and *French*, and that the period for which the Indemnity was to continue had expired; and therefore praying that it might be referred to the *Master* to inquire and state whether the purposes for which the Deeds and Writings were deposited with the *Marriotts* had been answered. An Order was made according to the Prayer of the Petition on the 27th June last; and the *Master*, by his Report, dated the 31st of July following, certified, that the purposes for which the Deeds

and Writings were deposited with the *Marriotts* had been answered.

1822.

MARRIOTT
v.
WHITE
and others.

Pettit, Rist, and French, now presented another Petition in the Cause; and, after stating the facts before mentioned, and that there was nothing in the transaction between *Pettit* and the *Marriotts* which gave occasion to the carrying of the Deeds of Indemnity into the *Master's* Office, but that the expediency of so doing (if any such expediency existed) arose out of considerations affecting those Persons alone who were interested in the Estates of the *Marriotts*, and were altogether foreign from the purposes of the Indemnity, or the Interests of the Petitioners, that the Costs of getting those Deeds out of the *Master's* Office ought to be borne by those Estates, and that the Sum of 498*l.* 17*s.* 3*d.* Cash was then standing in the name of the Accountant-General, to the Credit of the Cause, on Account of the Rents and Profits of the Real Estates of *Richard Marriott*, they prayed that the *Master's* Report might be confirmed, and that he might be ordered to deliver to *Rist* and *French* the Deeds and Writings which were deposited with the *Marriotts*, and also the Indenture of the 26th of March 1802; and that the Costs of the Petitioners, and all other Parties, might be taxed, and paid out of the Funds arising from the Rents and Profits of the Real Estates of the *Marriotts*.

Mr. *Bell*, and Mr. *Alcock*, for the Petitioners.

Mr. *Heald*, and Mr. *Temple*, for the Plaintiffs, opposed that part of the Prayer of the Petition which related to the Costs.

1894.

MARRIOTT

v.

WHITE
and others.

The VICE-CHANCELLOR:—

As the Term of Twenty Years was not expired when the Deeds were brought into the *Master's* Office, the Testator's Estate had an Interest in those Deeds at that time, and they were therefore properly brought into Court under the Decree.

A Stranger may intervene in a Cause with respect to a claim of Interest in Property which the Court has taken under its protection; as upon a Petition to be examined *pro interesse suo*, or to be at liberty to bring an Ejectment, where the Court had appointed a Receiver.

His Honor made an Order for the delivery of the Deeds, according to the Prayer of the Petition; and directed the Costs of all Parties, under the former Order, as well as under the present Petition, to be taxed, and paid out of the Sum (498 *l.* 17 *s.* 3 *d.*) in Court.

1822.

6th November.

GARSTONE v. EDWARDS.

Biddings will not be opened, even in a Creditor's Suit, upon an advance of 350 *l.* upon 5,300 *l.*

MR. Harne moved to open Biddings upon an Advance of 350 *l.* upon 5,300 *l.*, on the ground that this was a Creditor's Suit and an Insolvent Estate; and he cited *Brooks v. Snaith* (a), in which Case the Advance was only 500 *l.* upon 10,000 *l.*; and *White v. Wilson* (b), where there was the same Advance upon the same Sum, and the Motion was refused solely because the Report had been confirmed. In the two cited Cases the Advance was only 5 *l.* per Cent upon the Purchase-money; here it was 6 $\frac{1}{2}$ *l.* per Cent (c).

(a) 3 Ves. & B. 144.

(b) 14 Ves. 151.

(c) See also *Ex parte Partington*, 1 Ball & Beatty, 209.

The *Vice-Chancellor* refused the Motion; saying, it is true the Court does not confine itself to a particular rate *per Cent*, although 10 *l. per Cent* is a sort of general rule. The Cases cited establish, that where an Advance so large as 500 *l.* is offered, the Court will act upon it, though it be less than 10 *l. per Cent*; but in this Case 350 *l.* only is offered.

1822.

GARSTONE
v.
EDWARDS.

CUST v. BOODE.

1822.

6th November.

Practice.

MR. Koe moved that the Plea and Answer of A. C. Boode, one of the Defendants in this Cause, filed on the 1st day of November instant, might be taken off the File for Irregularity, with Costs to be taxed.

An Order having been obtained by Plaintiff to take a Demurrer off the File, it is irregular if the Defendant file a Plea and Answer before the Demurrer is actually taken off.

On the 8th of October, Boode filed a Demurrer to the Bill. On the 1st of November, the Plaintiff moved to take the Demurrer off the File, on the ground that it had been put in after the Defendant had obtained Orders for time to answer. The Motion was granted; and, on the same day, before the Demurrer was taken off, or even the Order drawn up, the Defendant filed a Plea and Answer. In this stage the present Motion was made by the Plaintiffs.

Mr. Koe, in support of the Motion, insisted that there could not be two Defences on the Files of the Court at the same time; and cited *Curzon v. Lord De la Zouch* (a).

(a) 1 Swanst. 185, note (a).

1822.

CURT
v.
BOONZ.

Mr. Hart, *contra* :—

The moment the Order is pronounced the Demurrer is off the File ; *Lorimer v. Lorimer (b)*. Can the Plaintiff complain that the Defendant saves him the trouble and expense of serving the Order ?

Mr. Koe, in reply :—

This Order is never served, but is taken to the Clerk in Court, and he takes the Demurrer off the File.

The *Vice-Chancellor* said that the Demurrer was not taken off the File by the mere pronouncing of the Order ; but that when the Order is drawn up, it is carried to the Clerk in Court, who withdraws the Demurrer, and usually annexes the Order to it.

In order, however, to save unnecessary expense, the *Vice-Chancellor* did not order the Plea and Answer to be taken off the File, but directed that the Defendant should pay the Costs of the Motion, and that the Plea and Answer should be taken as if regularly filed,

(b) 1 J. & W., 284.

BROOKFIELD v. BRADLEY.

1822.
6th November.

UPON a Sale before the *Master*, Two Lots were purchased by A. B.; one for 656*l.* and the other for 91*l.*

Biddings.

Mr. *Garratt* moved to open the Biddings, offering an Advance of 70*l.* for the former Lot, and 30*l.* for the latter.

Two Lots ordered to be re-sold in one, where the Advance offered on the smaller Lot was not sufficient to authorize the opening of the Biddings for that Lot separately (a).

The *Vice-Chancellor* refused to make the Order for the second Lot, the Advance being under 40*l.*; but recommended the Party moving to give a new Notice of Motion, that the Biddings for the Two Lots might be opened, and that a Re-sale might take place in One Lot, upon an advance of 100*l.* on the Two Lots. This would remove the difficulty of the small Advance upon the second Lot.

A new Notice of Motion was accordingly given, and the Order was made for a Re-sale in one Lot, on an Advance of 100*l.*

(a) *See Watts v. Martin*, 4 Bro. 113.

Sc. 2 Rep. 374. 3 Sim. 728.

CHRISTOPHER WELLMAN - - Plaintiff;
JOSEPH BOWRING, WILLIAM WEAVER, and
ELIZABETH his Wife, JOHN AXE, MARY
GENGE, and GEORGE BOWRING - Defendants.

1822.

7th November.

Construction.
Surrender.

The ultimate Limitation on a Surrender of Copyholds, in default of appointment, being to the two first-named Executors or Administrators of the Surrenderor, and the Custom of the Manor not admitting Tenants to any larger Estate than to Two, for their joint Lives and the Life of the Survivor, these Executors or Administrators are not Trustees for the Customary Heir.

Quare, Whether the Administrators shall hold for their own Benefit, or as Trustees for the next of Kin.

THE Plaintiff claimed to be absolutely entitled in Equity to a Copyhold Estate of the Manor of *Slape*, in the County of *Dorset*. His Bill prayed that *Joseph Bowring*, on whom the legal Estate had descended, might be declared to be a Trustee for his benefit, and be decreed to execute such Surrender as he should direct.

According to the Customs of the Manor of *Slape*, no Tenant can be admitted to an express Estate of Inheritance. The largest Estate to which Tenants are ever admitted, is to Two for their joint Lives and the Life of the longest liver of them. But any Tenant admitted for his Life has a power to nominate One or Two Persons to succeed him, "jointly and successively," as Tenant or Tenants; and that right of nomination may be exercised either by Surrender in open Court, or out of Court, by Writing executed in the presence of Two Tenants of the Manor, who must attest the same; and the form of such Surrender or Nomination is to the Surrenderee or Nominee "and his Assigns for ever;" or if Two, to them "and their Assigns for ever." A nomination of this kind need not be presented to the Steward of the Manor, or at the Court, before the Nominee applies to be admitted. It was also alleged to be a Custom of the Manor, that a Surrenderee, before he has himself been admitted, may surrender in favour of another Person, who is entitled to be admitted although the original Surrenderee has never been admit-

Held they take it as Trust for next of Kin. Sc. 3 Sim. 728.

ted, provided he pays the double Fine. Where there has been no Surrender or Nomination, the Heir at Law of the last Tenant is entitled to be admitted, subject, however, to the right of the Widow to the Estate during her Widowhood. The Fine payable by a Widow on Admittance, is one Penny; that payable by the Heir at Law or Nominee, in respect of the Estate in question, 10*l*.

1822.

WELLMAN
v.
BOWRING
and others.

In 1764, *Joseph Bryant* was entitled to the Estate now claimed by the Plaintiff. On the 13th July 1764, in consideration of his intended Marriage with *Elizabeth Wellman*, he surrendered this Estate into the hands of Two of the customary Tenants of the Manor, according to the Custom thereof, to the use of *Benjamin Wellman* and *John Bowring*, for their Lives, and the Life of the Survivor of them, and of their Assigns for ever, according to the Custom of the Manor, upon Trust, to stand possessed thereof in Trust, after the Marriage, to permit *Bryant* to receive the Rents and Profits to his own use, during his Life; and after his decease, in Trust to permit *E. Wellman* to receive the Rents and Profits during her Life; and, after their decease, upon Trust, to surrender the same to the use of such one or two Children of the said Marriage as *Bryant* and his Wife, or the Survivor, should appoint; and, in default of appointment, upon Trust, for such one or two Children absolutely; and, in case there should be no such Issue, then upon Trust, within two calendar Months next after the decease of the Survivor of *Bryant* and his Wife, to surrender the Estate to the use of such Person and Persons, for the Term of his, her, or their Life or Lives, and of his, her, or their Assigns, for ever, as *Bryant* should, by any Writing, or by his last Will and Testament, executed

1822.

WELLMAN
v.
BOWRING
and others.

and attested respectively as therein mentioned, nominate or appoint; and, for want of such nomination or appointment, *upon Trust, to surrender to the use of the Executors or Administrators of Bryant, if not exceeding Two, for the Term of their Lives, and of their Assigns, for ever; but if he should leave more than two Executors, or Administration to him should be granted to more than Two, then to the use of the Two that should be first named in his Will as his Executors, or, in the Administration, as his Administrators, for the Term of their Lives, and of the Life of the longest Liver of them, and of his or her Assigns, for ever.* The Deed by which these uses were declared, contained a Power for the Husband and Wife, at any time during their joint Lives, with the Consent of the Trustees, or of the Survivor of them, or of the Executors or Administrators of such Survivor, to revoke the Surrender, and to dispose of the Premises, as they should, with the like Consent, think fit. This Surrender was duly executed, but the Trustees were not regularly admitted to the Estate.

The Marriage between the Parties was shortly afterwards solemnized.—There never was any Issue of this Marriage. In the year 1779, *Bryant* died intestate, and without having made any Appointment or Nomination in pursuance of the power reserved to him, and without having in any manner revoked the uses of the Settlement, leaving *Elizabeth Bryant*, his Widow, and *John Bowring*, since deceased, Son of *John Bowring*, the Trustee of the Settlement, his Nephew and Heir at Law, and Heir according to the Custom of the Manor, him surviving. Soon after *Bryant's* death, his Widow obtained Letters of Administration of his Personal Estate, and she called upon the Trustees to surrender the Estate to her, according to the Provisions of that Settlement; and they, although they had not themselves been regularly

admitted, yet it being supposed that they were regular in so doing, at a Court holden for the Manor on the 30th of June 1782, absolutely surrendered the Estate to her and her Assigns for ever, according to the Custom of the Manor.

1822.

WELLMAN
v.
BOWRING
and others.

Mrs. *Bryant* was thereupon, at the same Court, admitted to hold the Estate for the term of her Life, according to the Custom of the Manor. Her Admission was in the following form; "To this Court came *Elizabeth Bryant*, Widow and Administratrix of all and singular the Goods and Chattels of *J. Bryant*, her late Husband, deceased, and took of the Lord, by the delivery of the Steward, All, &c. by virtue of a certain Surrender to her thereof made by *B. Wellman* and *John Bowring*, bearing even date herewith; To hold the said Premises unto the said *E. Bryant* for the term of her Life, according to the Custom of the said Manor, under the Rent, Duties and Services accustomed for the same; and for such Estate so to be had in the Premises, the said *Elizabeth Bryant* gave to the Lord, for a Fine, 10*l.* and was admitted Tenant, but her Fealty was dispensed with."

According to the form of this Admission, Mrs. *Bryant* was entitled to the absolute Property in the Premises, and had full power to dispose thereof, the form of her Admission being that used by the Custom of the Manor to give the longest and most absolute Property in Lands held of that Manor. After her Admittance, she nominated *Benjamin Wellman*, and *Benjamin Wellman* the younger, his Son, to be admitted to the Estate upon her decease. She herself continued in Possession of the Estate until the time of her death. In 1803 she died; having paid all her Husband's Debts; so that since her death no one had administered to his Estate.

1822.

WELLMAN
v.
BOWRING
and others.

Benjamin Wellman the elder having died in *Mrs. Bryant's* Lifetime, *B. Wellman* the younger, upon her death, became entitled absolutely to the Estate under her Nomination. Accordingly, on the 8th of August 1803, he was admitted Tenant of the Estate for his Life, according to the Custom of the Manor, and paid to the Lord the customary Fine of 10*l.* He continued in Possession of the Estate until his death. In 1806 he died, having duly nominated, according to the Custom of the Manor, his Son, *Hugh Wellman*, to be admitted Tenant upon his death; but after his death, his Widow was admitted for her Widow's Estate. *Hugh Wellman* died in her Lifetime, leaving the Plaintiff, his Brother and Heir at Law, and Heir according to the Custom of the Manor. The Plaintiff was also the eldest Son and Heir at Law, and Heir according to the Custom of the Manor, of *B. Wellman* the younger. In 1813, the Widow of *B. Wellman* the younger died, and the Plaintiff thereupon was, at a Court Baron held for the Manor on the 9th of June 1813, duly admitted to the Estate for his Life, according to the Custom of the Manor, as eldest Son and Heir at Law, or customary Heir of *Benjamin Wellman* the younger, and as eldest Brother and Heir of *Hugh Wellman*. This Admission was in the following form: "To this Court cometh *Christopher Wellman*, of *Bristol*, in the County of *Somerset*, eldest Son and Heir at Law or customary Heir of *Benjamin Wellman*, deceased, and also eldest Brother and Heir of *Hugh Wellman*, deceased, who was Heir and Nominee of the said *Benjamin Wellman*, and who died an Infant, and claimeth to hold, for the term of his Life, All, &c. by virtue of being the eldest Son and customary Heir of the said *B. Wellman*, deceased, and of being the eldest Son and customary Heir of the said *Hugh Wellman*, also deceased, the Nominee of the said *B. Wellman*,

and who died an Infant, unadmitted and incapable of making any act to dispose thereof according to the said Manor; And the said *Christopher Wellman* prayeth to be admitted as Tenant thereto; To whom the Lord of the Manor doth here, in full Court, grant Seisin thereof by the Rod; To Hold the said Premises unto the said *Christopher Wellman* for his Life, according to the Custom of the said Manor, under the yearly Rent of 4s. 4d. and all Heriots, Dues, Duties and Services of right due and accustomed to the Lord of the said Manor for the same; and the said *Christopher Wellman*, for such his Estate in the said Premises, gave to the Lord of the said Manor, for a Fine, the Sum of 10*l.* but his Fealty is respited."

1822.

WELLMAN
v.
BOWRING
and others.

It was not discovered, until a short time before this Bill was filed, that *Benjamin Wellman* and *J. Bowring* had not been regularly admitted before the Surrender to *Mrs. Bryant* in the year 1782, and that the Surrender then made was inoperative as to the legal Estate, which had remained in *J. Bryant* until his death, and upon his death descended to *John Bowring*, as his Nephew and Heir at Law and customary Heir. *Joseph Bowring*, the Defendant, was the Heir at Law, and Heir according to the Custom of the Manor, not only of *John Bowring* the Trustee named in the Settlement, but also of *Joseph Bryant* the Settlor.

Joseph Bowring, and the other Defendants, were the next of Kin of *Joseph Bryant*.

Some time before the Bill was filed, *Joseph Bowring* brought an Action of Ejectment against the Tenant in Possession of the Estate under the Plaintiff;

1822.

WELLMAN
v.BOWRING
and others.

and the Judge who tried the Action being of opinion that the legal Estate was vested in *Joseph Bowring*, the Jury found a verdict in his favour.

The Plaintiff insisted by his Bill, that it was intended by *Bryant* and all the Parties to the Settlement, that the whole interest in the Premises, subject to the Life Estate thereby created, and in the event of there being no Children of the Marriage or other appointment by *Bryant*, should be enjoyed by his Administrators or Executors for their own use and benefit; and that it was in consequence of this intention that *Bryant* abstained from making any other Disposition of the ultimate interest in his Estate, though he was entitled to do so by the Settlement: He also insisted on various acts by which the Defendant *Joseph Bowring*, as well as *John Bowring* the younger, through whom he claimed, and all the other Defendants, had repeatedly admitted, that they had no Claim to, or beneficial Interest in, the Premises; and on the fact, that *John Bowring* and the Defendants, though they well knew, long before the year 1808, that Mrs. *Bryant* was not admitted to the Premises for her Widow's Estate, yet never attempted to have it secured for their benefit, or made any claim thereto until after Mrs. *Bryant's* death; when *Joseph Bowring*, in Hilary Term 1808 (supposing that the legal Estate was vested in the Persons claiming under Mrs. *Bryant*) filed his Bill in this Court, praying, that the Premises might be surrendered to him, and that, if the Court should be of opinion that *Bryant's* next of Kin were entitled upon his decease to the Premises, then a Surrender might be executed to such next of Kin; but that, having lately discovered the defect in the supposed want of the Admission of *B. Wellman* and *John Bowring*, he had abandoned that Suit, and proceeded in the Ejectment.

The Plaintiff also insisted, that if the next of Kin of *Joseph Bryant* had any Interest in the Premises, he, in Right of *Mrs. Bryant*, the Widow of *J. Bryant*, was entitled to one moiety thereof.

1822.
WELLMAN
v.
BOWRING
and others.

The Bill therefore prayed, that *Joseph Bowring* might be declared a Trustee of the Premises for the Plaintiff, and might be decreed to execute a proper Surrender thereof to him; or, if the Court should be of opinion that *Bryant's* next of Kin had any Interest in the Premises, then that the Plaintiff might be declared entitled to all such Interest as *Mrs. Bryant* had therein, and that *Joseph Bowring* might be restrained from proceeding in the Action of Ejectment.

The Defendant *Joseph Bowring*, by his Answer, insisted, that *Mrs. Bryant* acquired, by her Admission, an Estate for her Life only, as the Widow of her late Husband, and not the absolute Property in the Premises, although the form of her admission was the form used by the Custom of the Manor to confer the largest and most absolute Property in the Premises: And that, upon the death of *John Bowring*, who was the customary Heir of *Joseph Bryant*, as well the equitable, as the legal Estate in the Premises, became, and still was, vested in him (*Joseph Bowring*) absolutely, and not subject to the Trusts in the Bill mentioned, or to any other Trust; and that neither the beneficial nor legal Interest which *Bryant* had in the Premises, was effectually bound or disposed of by the Settlement of July 1764; and that *Bryant* did not, by such Settlement, or by any other means, effectually nominate or designate the Persons who were to have the benefit of, or to be admitted to the Premises after his death; and he submitted that, if the Settlement was effectual to vest in the

1822.

WELLMAN
v.
BOWRING
and others.

Trustees any equitable or beneficial Interest in the Premises, he, as Heir at Law of *Bryant*, was, under that Settlement, entitled to the Entirety of the Premises; or that, as one of *Bryant's* next of Kin, he was entitled to a Share thereof jointly with the other Defendants.

The other Defendants, by their Answer, submitted that, upon *Bryant's* death, the Property (subject to the Estate limited by the Settlement to Mrs. *Bryant* for her Life) descended, according to the Custom of the Manor, to them and the rest of *Bryant's* next of Kin, or became vested, under the Settlement, in the Administratrix, for their benefit; and that Mrs. *Bryant* had no right to make any Nomination and Appointment of the Estate; and that the Plaintiff did not by the several Surrenders and Admissions in the Bill mentioned, or by any other means, become entitled to any legal interest in the Premises, or if he did, that he was a Trustee thereof for the next of Kin. And they also submitted, that, according to the true intent and meaning of the Settlement and the Custom of the Manor, the Limitation contained in the Settlement, was intended to be a Limitation for the execution of the Trusts of *Bryant's* Will, if he should make any, and, if not, for the benefit of his Children, or other next of Kin, who, according to the Custom of the Manor, would otherwise have been entitled to the Premises. And the Defendants, *George Bowring*, *William Weaver*, and *Elizabeth* his Wife, in her right, and *Mary Genge*, as Three of the next of Kin of *Bryant*, and the Defendant, *John Are*, as the Representative of *Jane* his late Wife, another of such next of Kin, claimed four fifth parts of the Premises, and of the Rents and Profits thereof, since Mrs. *Bryant's* death.

It was proved by evidence on behalf of the Plaintiff, that Mrs. *Bryant*, upon the Premises being surrendered to her by the Trustees, did in fact pay the Fine due upon their Admission, as well as upon her own.

1822.
WELLMAN
v.
BOWRING
and others.

The Ejectment mentioned in the Pleadings was first tried at the Summer Assizes for the County of *Dorset*, in the Year 1816, when the Plaintiff was nonsuited; but the learned Judge who tried the Action gave the Lessor of the Plaintiff leave to move to set the Nonsuit aside; and a Rule *Nisi* having been obtained for that purpose, it was made absolute in Hilary Term 1817. The Action having again come on for Trial, at the following Spring Assizes for the County of *Dorset*, a Verdict was found for the Lessor of the Plaintiff.

The Cause now came on to be heard.

Mr. *Wingfield*, and Mr. *Preston*, for the Plaintiff:—

This Estate is a Fee Simple, by way of perpetual Renewal, and the legal Estate in this Copyhold is, according to the last decision at Law, in the Defendant *Joseph Bowring*. By the Custom of the Manor, the Parties who make the Surrender are to designate the Person who is to take. Why is it not a good designation to say, “I leave the Estate to the Person who is my personal Representative?” It may be said that this is a conversion into personal Estate. But that argument cannot be raised, because these are words of description and not of limitation; and therefore the Person who fills the description is to take the Estate beneficially, and independent of any Trust. There is no intention that the Persons here described were to take the Estate in the character of Executors or Administrators, for the words are not to “the Executors

1822.

WELLMAN

v.

BOWRING
and others.

and Administrators," but "to the two that *should be first named*;" therefore, it is quite obvious that the Party here designated as Executor was not meant to take as such, so as to make the Estate part of the Settlor's Assets. *Cranmer's Case* (a); *Spark v. Spark* (b); *Evans v. Charles* (c); *Sanders v. Franks* (d). In the last Case, the Gift was "to the Executors and Administrators, to and for his, her, or their own use and benefit;" and the words "to and for his, her, or their own use and benefit," formed the ground of the Decision. Here too the Settlor does not stop at the words "Executors or Administrators," but adds, "and their Assigns for ever," which are equivalent to the words which formed the ground of Decision in the former Case, and show that the Executors and Administrators were to have a power of Alienation. It is quite clear, therefore, from the context of this Settlement, that *Bryant* did not intend to select Executors, as Executors; but that they should take the Estate for their own benefit.

Mr. Sugden, and Mr. James Stephen, for the Defendant *Joseph Bowring* :—

It is admitted that this Estate is *quasi* an Estate of Inheritance; and that, if not otherwise disposed of, we are entitled. Indeed, it is quite settled that this mode of Limitation does create an Estate of Inheritance. The Tenant may cut Timber, and has all the privileges of a Tenant in Fee. The Courts incline to hold, upon the slightest expression, that the Heir is entitled to the exclusion of all other Persons; therefore, if there had been no Specialty against our Title, we should have taken as Heir at Law. The Parties might have limited the Estate to themselves, without limiting it to two

(a) Dyer, 309 a.

(b) Cro. Eliz. 666. & 840.

(c) 1 Anstr. 128.

(d) 2 Madd. 147.

1822.

WELLMAN
v.
BOWRING
and others.

Trustees ; but their intention was to place the Estate throughout in Trustees : the intention of the Parties was, in order that they might have Trustees on whom they could rely until some Person became absolutely entitled, that their own Executors should be Trustees. The question is, who is entitled to the equitable Interest ; not whether the Executors take as *persone designata*, but whether they take for their own benefit or not. It is quite clear, that where Property is given to the personal Representatives of any Person, that they do not take for their own benefit, but as Trustees (e). The Case of *Ripley v. Waterworth* (f) decided that it was impossible that Executors should take any interest in the character of Executors which is not liable to Debts and Distribution ; and there the Will was not executed so as to pass the Estate itself. There was a Case mentioned there, as to the difficulty which arose upon a Disposition of Stock by an unattested Will. Though all the Acts require that a Will disposing of Stock should be attested by Two Witnesses, yet it was held, that, if the Will was not so attested, the Executors must hold it for the Persons for whom the Testator intended it.

The case of Executors taking as special Occupants, and yet holding the land as Assets, before the Statute of 2 Geo. II., still further supports this position. The Authorities for this are *Westfaling v. Westfaling* (g), *Duke of Devon v. Kinton* (h), *Williams v. Jekyll* (i).

Evans v. Charles, which has been cited for the Plaintiff, has been doubted repeatedly, and has been denied

(e) Leon. 239. *Bridge v. Abbott*, 3 Bro. 224.

(f) 7 Ves. 425. (g) 3 Atk. 466.

(h) 2 Vern. 719 ; 2 P. W. 381. This Case is reported by P. W. under the name of *Duke of Devon v. Atkins*.

(i) 2 Ves. 681.

1822.

WELLMAN
v.
BOWRING
and others.

by the *Lord Chancellor*; besides, the Funds in that Case belonged to third Persons. In *Sanders v. Franks*, the Judgment turned upon the words "to and for his, her, and their own use and benefit," which are not found in this Case.

It was admitted for the Plaintiff, that the reason why the two first Executors were to take, was, not because the Settlor had any affection for those who might be first named, but because the custom did not enable him to give it to more than two. It cannot be supposed that the Settlor intended a provision for Persons over the appointment of whom he had no control. The Administrator is the nominee of the Ordinary, not of the Intestate. The Settlor could not control the way in which the Ecclesiastical Court might choose to state these persons as Administrators. If Administration had been granted to Creditors, then the two first named would have taken as Purchasers, for their own benefit, and to the exclusion of the other Creditors. Suppose that *Bryant* had made a Will, appointing four Executors, and that the two first named died in his lifetime, there would have been a forfeiture to the Lord for want of a Tenant; a risk to which it cannot be supposed that he meant to expose his Estate.

It has been suggested, that the intention to give beneficially arose from the anticipation, that, in the event of intestacy, the Husband and Wife would be entitled to represent each other; and that, therefore, this was but a mode of indirectly giving the Estate to them in that event. That this could not be the intention is evident from the frame of the Settlement; for the Surrender to the Executors or Administrators is not directed to be made until two months after the decease of the Sur-

vivor of the Husband and Wife ; and besides, an Estate for Life is given to the Wife if she survives, which implies that nothing further is intended for her.

1822.

WELLMAN
v.

BOWRING
and others.

It appears that the framers of the Settlement supposed, that, upon the death of the Survivor of the Trustees, his Executors would be entitled, by the Custom of the Manor, to have their names on the Rolls ; for it is the consent of the Executors, not of the Heir of the surviving Trustee, that is required to enable *Bryant* and his Wife to revoke the uses of the Settlement, and to make a new Disposition of the Estate. And if they supposed that the Executors of the surviving Trustee would by the Custom be entitled to have their names on the Rolls, it may be fairly inferred that they intended the Estate to revert to its ancient line of descent. Now the Plaintiff's claim rests on the supposed intention of the Settlor to divert this Property from the regular course of descent. But what motive could there be to alter the descendible quality of this Estate ?

There is another ground that may be taken ; that this Limitation operates only in Equity, and gives the other Party no Equity whatever to come against the Party who has the legal Estate ; for the Limitation is merely voluntary. *Sutton v. Chetwynd* (k). A Limitation to Executors and Administrators must include Strangers to the consideration of the Settlement. And if a Stranger come for the execution of a Covenant, the Answer is, that being a Stranger to the Consideration, he cannot call upon the Court for the legal Estate.

THE VICE-CHANCELLOR.

This is a mere case of intention upon the construction of the Settlement. There is here no question that the

(k) 3 Mer. 249.

1832.

WELLMAN
v.BOWRING
and others.

Administratrix was a *persona designata*, with apt words of Limitation, according to the nature of the Property, and was entitled to take the Copyhold as a Purchaser.

The real question in the Cause is, whether the Husband intended that the Administratrix should take the Copyhold beneficially, or as a Trustee. A Trust may be either expressed or implied. There is clearly here no Trust expressed. Nor is there any thing in this Settlement from which a Trust can be implied, unless it can be maintained that the Copyhold is given, not to the Persons of the Executors or Administrators, but to their Office. But if this could be maintained it would not benefit the Defendant in his character of Copyhold Heir. It might benefit him in his character of one of the Testator's next of Kin. But before I can consider the Claim of the next of Kin, I must know that I have before me all the Persons, who, being next of Kin, are entitled to be heard upon this question.

All therefore I can do at present is, to declare that the Defendant *Joseph Bowring*, as the Copyhold Heir of *Joseph Bryant* the Husband, was a Trustee of the legal Estate for the Widow as Administratrix of her Husband; and to refer it to the *Master* to inquire who are the next of Kin; and to reserve the consideration of all further directions until after the *Master* shall have made his Report.

ROBERTS v. ROBERTS.

1822.
7th November

THE Plaintiff filed his Bill against the Defendant, his Brother, praying that a Deed, to which he claimed to be entitled, might be delivered up to him.

Where the subject of a Suit has been disposed of out of Court, the Court will not hear the Cause merely for the purpose of disposing of the Costs.

After the Suit was ripe for hearing, the Defendant purchased of the Plaintiff that Title under which he claimed the Deed.

The Cause was now called on to be heard.

Mr. Sugden, for the Defendant, stated these facts to the Court, and wished the Cause now to be heard, for the purpose of determining the question of Costs of the Suit.

The Counsel on the other side admitted the facts, and were also desirous that the Cause should be heard for that purpose.

The VICE-CHANCELLOR :—

The Court entertains the subject of Costs only as incidental to the subject of the Suit. When, out of Court, the Parties dispose of the subject of the Suit, they must dispose of the Costs also. The Court will not hear the Cause for that purpose.

1822.

8th November.

WELLBELOVED v. JONES.

Charities.

The Attorney General is a necessary Party to all Suits for Charitable Funds, except where a Legacy is given to the Officer of an established Institution, as part of its General Funds.

Where a Legacy is given, for permanent Charitable Purposes, to Persons having no Corporate character, the Court will not, without a Reference to the Master, allow the Fund to be paid over to those Persons, even where they are intrusted by the Testator with the Management of the Fund.

THIS was a Bill filed by certain Persons, who described themselves as Trustees or Officers of a Dissenting Academical Institution, against the Executors of *Samuel Jones*, for Payment to them of a Legacy of 5,000 *l.* bequeathed to that Institution.

Samuel Jones, by his Will, dated 19th December 1818, (after giving several Annuities and Legacies) gave and bequeathed the sum of 5,000 *l.* unto his Brother *William Jones*, his Nephew, *Samuel Jones Lloyd*, and *James Darbyshire* the younger (the Defendants in this Cause) their Executors, Administrators, and Assigns, *upon Trust*, to transfer and assign the same Sum and the Stocks, Funds and Securities wherein the same should be invested, unto the following Officers for the time being of an Academical Institution established at *York* chiefly for the Instruction of Dissenting Ministers; and commonly called the *Manchester* New College removed to *York*, viz. the Theological Tutor, the Visitor, the President, the Treasurer, and the Vice-President, resident in *Manchester*; which said several Officers, together with such other Persons as they should think proper to choose (in case they should think an additional number of Trustees necessary) should stand possessed of the said Sum of 5,000 *l.* and the Stocks, &c. *in Trust*, to pay and apply the Dividends and Interest thereof in Augmentation of the Salaries of such conscientious Dissenting Ministers as should stand most in need of such Assistance, and as the said Trustees should ap-

prove; a preference being given to those who should have been Students in the *York* Institution. *And in case* such Institution should cease, or be given up, *then in Trust*, that the Persons in whose Names the said Trust Monies should be then invested, should transfer the said Principal Sum to the principal Officers for the time being of such other Institution as should succeed the same, or be established on similar principles, that is to say, for the Instruction of young Men in the genuine Doctrines of Christianity, as revealed in the Scriptures, without regard to Sect or Party; and if there should ever come a time when no Institution should exist for that purpose, *then* the said principal Sum of 5,000*l.* to be paid and transferred to the Persons calling themselves the Trustees of Lady *Hewley's* Funds, to be by them applied to the same charitable purposes as that Fund then was usually applied to. And the Testator thereby empowered and requested the Officers of the Institution, in whom the Sum of 5,000*l.* should first become vested, at any time within the space of twelve calendar Months next after the Trust Monies should come to their hands, to make such further Rules and Regulations for the distribution of the Interest and Dividends of that Sum, and for preventing any Loss of the Principal, and for otherwise securing and perpetuating the Trusts intended by his Will as they should judge necessary or convenient.

At the time of the Testator's death, the Plaintiffs held, and still hold, the offices of Theological Tutor, Visitor, President, Treasurer, and Vice-President, of the Institution at *York*. They therefore prayed that the Legacy of 5,000*l.* might be transferred to them by the Defendants, according to the Trusts of the Will.

1822.

WELLBELOVED
v.
JONES.

1822.

WELLBELOVED
v.
JONES.

The Defendants, by their Answer, admitted Assets, but submitted to the Judgment of the Court, whether the Bequest was not a Charity Bequest, and whether the Plaintiffs had any right to institute this or any Suit touching the matters alleged in the Bill; and whether the *Attorney-General* ought not to be a Party.

The Cause now came on to be heard.

Mr. *Heald* and Mr. *Roupell*, for the Defendants, insisted on the objection that the *Attorney-General* ought to have been made a Party, and said that this was a Bequest for a perpetual Charity, and that it must be sent to the *Master* to approve of a Scheme for the management of the Fund.

Mr. *Agar*, and Mr. *S. Smith*, for the Plaintiffs:—

Where the Testator intrusts the Trustees with the Administration of a Charity, as in this Case, and reposes a confidence in them, the *Attorney-General* is not a necessary Party; though it may be otherwise where the management is not so intrusted. In *Waldo v. Caley* (a), where there was a Bequest for a charitable purpose, the distribution and application of the Fund being left by the Testator to the discretion of his Wife, she was intrusted with the Fund. Here the Trustees were most respectable Persons, and the management of the 5,000 l. was, by the words of the Will, intrusted to them; they were, therefore, entitled to have it paid over into their hands.

The VICE-CHANCELLOR:—

The *Attorney-General* must be made a Party. He is

(a) 16 Ves. 206. In that case there was no Bequest for permanent charitable purposes.

to be a Party, not for the reason stated at the Bar, but because the King, as *parens patriæ*, superintends the administration of all Charities, and acts by the *Attorney-General*, who is his proper Officer in this respect.

1822.

WELBELOVED
v.
JONES.

It has been held not to be necessary that the *Attorney-General* should be a Party where a Legacy is given to the Treasurer, or other officer of some established charitable Institution, to become a part of the general Funds of that Institution; and this exception is reasonable; for the *Attorney-General* can have no interference with the distribution of their general Funds.

The Court will never permit this Legacy to come into the hands of the Plaintiffs, who now happen to fill the particular offices in this Society; but will take care to secure the objects of this Testator, by the creation of a proper and permanent Trust; and, upon the hearing of this Cause, will send it to the *Master* for that purpose; and it will be one of the duties of the *Attorney-General* to attend the *Master* upon that subject.

The Cause was ordered to stand over, with leave to amend, by making the *Attorney-General* a Party.

1822.

11th November.

LONDON v. READY.

Décree.

Where a Decree is made upon a Bill taken *pro confesso*, the Court, whether the Defendant has or has not appeared, pronounces an absolute Decree in the first instance, and does not give the Defendant a day to show Cause.

IN this Case the Defendant had answered the original Bill. An amended Bill was afterwards filed, to which he had appeared, but not answered, and had stood out all process of Contempt. The Cause was therefore now set down for the purpose of having the Bill taken *pro confesso* against him (a).

Mr. Roupell, for the Plaintiff, having stated the above facts, said, that where a Bill was taken *pro confesso* before the Defendant had appeared, the Court makes the Decree, but that, after Appearance, the Plaintiff was entitled to take such Decree as he could abide by.

The VICE-CHANCELLOR:—

It appears to me that there is no difference whether the Bill is to be taken *pro confesso* before or after Appearance. The effect of taking a Bill *pro confesso* is, that all the facts stated in the Bill are taken to be true, as against the Defendant; but the Plaintiff can only have such a Decree as the facts of the Case entitle him to in the judgment of the Court. If a Party being served with a Subpœna to hear Judgment, does not appear, then the Plaintiff takes such Decree as he can abide by, and a day is given for the Defendant to show Cause against the Decree. But where a Bill is taken *pro confesso*, no day is given to the Defendant to show Cause, and an absolute Decree is made in the first instance (b).

(a) That an Answer to the Original Bill cannot be read, and therefore will not prevent the amended Bill from being taken *pro confesso*, see *Jopling v. Stuart*, 4 Ves. jun. 619, and *Bacon v. Griffith*, stated in the Note to that Case.

(b) *Geary v. Sheridan*, 8 Ves. 192; and see 13 Ves. 565.

LANGLEY v. SNEYD and others.

1822.
12th November.

THE Bill prayed that it might be declared that the Plaintiff, as heir *ex parte paternâ* of *Thomas Langley*, the Son, who died an infant, was entitled to the equitable Interest in certain Estates devised and appointed to the said *Thomas Langley*, the Son, by the Will of his Mother, *Margaret Langley*. One of the Defendants claimed these Estates as Heir *ex parte maternâ* of *Thomas Langley*, the Son. The legal Estate was vested in a Trustee.

Infant. Descent.

Where an Infant died seised of an Equitable Estate, descended *ex parte maternâ*, his incapacity to call for a Conveyance of the legal Estate (by which the course of the Descent might have been broken), is not a sufficient reason to induce the Court to consider the Case as if such a Conveyance had actually been made; it not being, according to the Terms of the Trust, any part of the express duty of the Trustees to execute such a Conveyance.

By an Indenture, dated 14th October 1786, made between *Edward Walburn Okeover*, and *Margaret* his Wife, of the one part, and *John Sneyd*, of the other part; after reciting, that, by certain Indentures of Lease and Release, dated the 12th and 13th February 1777, in consideration of the Marriage then about to take place between the said *E. W. Okeover* and *Margaret* his Wife (then *Margaret Bowyer*, Spinster) part of the Estates in question in this Cause, of which *William Bowyer*, the Father of the said *Margaret Bowyer*, was then seised in Fee, were conveyed to *Thomas Ley* and *John Goodwin*, their Heirs and Assigns, to the use of the said *William Bowyer* for Life; Remainder to the use of Trustees to preserve contingent Remainders; Remainder to the use of the said *E. W. Okeover* for Life; Remainder to the use of Trustees, to preserve contingent Remainders; Remainder to the use of the said *Margaret Okeover*, for Life; Remainder to the use of Trustees to preserve contingent Remainders; Remainder to other Trustees, for a term of five hundred years, on Trust, to raise Portions for the younger Children of the Marriage; Remainder to the use of the first and other

1822.

LANGLEY
v.
SNEYD
and others.

Sons of the Marriage, in Tail ; Remainder to the use of the Daughters of the Marriage, as Tenants in Common in Tail ; with Reversion to the use of the right Heirs of *William Bowyer* for ever :—And also reciting, that the said *William Bowyer* had died on the 3d October 1780, having made his Will, whereby he devised (subject to certain Charges) all his Estates and Hereditaments (not settled by the said Indentures of the 12th and 13th February 1777) to Trustees and their Heirs, to the use of his Wife, *Christiana Bowyer*, for her Life, in lieu of Dower ; Remainder to *E. W. Okeover*, for Life ; Remainder to Trustees to preserve contingent Remainders ; Remainder to *Margaret Okeover*, for Life ; Remainder to Trustees to preserve contingent Remainders ; Remainder (subject to a Charge for Daughters and younger Children) to the first and other Sons of *E. W. Okeover* and *Margaret* his Wife, in Tail ; Remainder to the Daughters of the said *E. W. Okeover* and *Margaret* his Wife, as Tenants in Common in Tail ; with Remainder to *Margaret Okeover*, her Heirs and Assigns for ever :—And also reciting, that the Marriage between *E. W. Okeover* and *Margaret* his Wife had been duly solemnized ; and that *Christiana Bowyer* was then living, and that there was no Issue of the Marriage ; and that it had been agreed that the Reversion and Remainder in Fee Simple in all the Estates expectant on the determination of the Estates for Life of *Christiana Bowyer*, and *E. W. Okeover* and *Margaret* his Wife, and in default of Issue of their bodies should be settled in the manner therein mentioned—*It was witnessed*, that *E. W. Okeover*, for himself and his Wife, their Executors, &c. did covenant with *John Sneyd*, his Heirs and Assigns, that they would, as of Michaelmas Term 1786, acknowledge and levy unto *John Sneyd* and his Heirs a Fine sur cognizance

de droit tantum; and that the Conusee of such Fine should stand seised of the said Estates, in the first place, to confirm the several Uses and Estates limited by the recited Indentures and Will, and, subject thereto, to the use of *John Sneyd*, his Heirs and Assigns for ever, Upon Trust, to convey and assure the Estates to the use of such Person and Persons, for such Estate and Estates, and in such Parts, Shares and Proportions, &c. as *Margaret Okeover*, by her last Will and Testament in Writing, or any Writing purporting to be such Will, to be signed and attested in manner therein mentioned, should appoint; and for default thereof, In Trust for *Margaret Okeover*, her Heirs and Assigns for ever.

1822.

LANGLEY
 v.
SNEYD
 and others.

A Fine was duly levied in Michaelmas Term 1786, according to the Covenant in this Deed.

E. W. Okeover died many years ago, without leaving any Issue by *Margaret* his Wife. *Christiana Bowyer* also died many years ago. In 1797, *Margaret Okeover* intermarried with the Rev. *Thomas Langley*, who died in 1808, leaving *Margaret Langley* his Widow, and *Thomas Langley* his only Son, and *Margaret Langley* his only daughter, by the said *Margaret Langley* his Wife, him surviving.

Margaret Langley, the Daughter, died an Infant, and unmarried, in the Lifetime of her Mother.

Margaret Langley, the Mother, executed a Testamentary Appointment dated 25th August 1819, according to the forms required by the Power, and thereby appointed and gave all the Estates to her Son, *Thomas Langley*, his Heirs and Assigns for ever, subject to certain Legacies and other Charges; provided that if her Son should die in her Lifetime without Issue,

1822.

LANGLEY

v.

SNEYD
and others.

all her Estates should go to her Sister, *Sarah Welch*, for her sole and separate Use, and to her Heirs, for ever.

On the 22d February 1821, *Margaret Langley*, the Mother, died, without having altered or revoked this Appointment. Her Son, *Thomas Langley*, survived her, but died on the 27th March 1821, an Infant, unmarried and intestate, leaving the Plaintiff, the only Brother of *Thomas Langley* the Father, his Heir at Law.

John Sneyd, the Trustee under the Indenture of the 14th October 1786, and Conusee of the Fine, died many years ago, and the legal Fee in the Estates was now vested in *William Sneyd*, one of the Defendants.

The other Defendants, *John Harrison* and *Elizabeth* his Wife, and *Sarah Ellen Evans*, claimed these Estates by descent *ex parte maternâ*; *Elizabeth Harrison* and *Sarah Ellen Evans* being Co-heiresses at Law, *ex parte maternâ*, of *Thomas Langley* the Son. They therefore, with *William Sneyd* the Trustee, had brought an Action of Ejectment against the Plaintiff, to recover Possession of the Estates. The Bill prayed an Injunction to stay this Action.

The Plaintiff obtained an Injunction to stay the Proceedings at Law: and a Motion having been made to dissolve this Injunction, the *Vice-Chancellor*, on that occasion, directed a Case to be stated for the opinion of the Court of Common Pleas, as to the effect of the Will or Appointment of Mrs. *Langley* (stating the Case as if it operated on the legal Estate) and whether *Thomas Langley*, the Son, took by Descent or by Purchase under the Appointment. The Case was argued before

the Court of Common Pleas in Easter Term 1822, and is reported 3 Brod. & Bing. 243. The Certificate of the Judges of the Court of Common Pleas was in the following terms :

1822.
 LANGLEY
 v.
 SNEYD
 and others.

“ This Case has been argued before us by Counsel ; we have considered it, and are of opinion,

“ *First*, That the Instrument dated 25th August 1819, executed by the said *Margaret Langley*, does not, as to the Estates comprised in the said Indenture of the 14th October 1786, and the said Fine, operate at Law as an execution of her power of Appointment, but as a Devise by her, by force of her Interest.

“ *Secondly*, This question does not arise (a).

“ *Thirdly*, We are of opinion that *Thomas Langley*, her Son, took by descent from his Mother, and not by Purchase.

(Signed) “ *R. Dallas*,
 “ *J. A. Park*,
 “ *J. Burrough*,
 “ *J. Richardson*.”

May 14th 1822.

The Cause now came on to be heard in this Court.

Mr. *Hart*, Mr. *Sugden*, and Mr. *Cooper*, for the Plaintiff:—

I. The Court must consider that the equitable Interest in this Estate has descended in the same course as if *Thomas Langley*, the Son, had obtained a Conveyance of the legal Estate from the Trustee in his Lifetime.

(a) It applied only in case it should be held that the Instrument operated as an appointment.

1822.
 LANGLEY
 v.
 SNEYD
 and others.

There is no doubt of his right to have called for such a Conveyance ; and if that right had been exercised—if Mr. *Sneyd*, the Trustee, had executed a Conveyance to him, the Estate would have descended in a new Line, and the heir *ex parte paternâ* would now be entitled. *Watk. on Descents*, [181], 3d edit. 285. A Conveyance, executed by the Trustee would have the same effect as a Feoffment and Re-feoffment, which it is decided will break the course of the Descent. During the Life of *Margaret Langley*, the Mother, there was no reason why the Trustee should convey the legal Estate, because his Trust was to convey to such Person as she should by *Will* appoint.

Although it is impossible to deny that she had the equitable Reversion in Fee in her, yet it may be contended that she was not entitled to call for a Conveyance of the legal Estate, during the pendency of her Power ; because, as her Appointment must have been by *Will*, it could not be complete till her death. Whether, if she had filed a Bill against the Trustee to compel him to convey the legal Estate to her, the Court would or would not have compelled him to do so, would depend on whether the Power could be destroyed.

She did not, however, take any step to compel a Conveyance, and, therefore, the Trustee would not consider himself called upon to convey till after her death. But though the Court should now be of opinion that Mrs. *Langley* might have compelled a Conveyance, that would not operate against the claim of the Plaintiff. For, the question is not, Whether she could, by her own act, and by compelling a Conveyance, have defeated the Settlement which had been made ; but whether it was any part of the Trustee's duty to execute a Con-

1822.

LANGLEY
v.
SNEYD
and others.

veyance of the legal Estate in her Lifetime. Granting that she might, by her own act, have defeated the Trust by compelling him to convey, yet, as she did not do so, the question is, Whether, at the moment of her death, it did not become the duty of the Trustee to execute a Conveyance? The Trust reposed in him was to execute a Conveyance to the Appointee; and the greatest inconvenience would arise if the Court should hold that, in such a Case as this, the construction should depend on the act of the Trustee. That would be to put it in his power to give the Estate to which Line of Heirs he pleased, in every Case like the present, where the Party entitled to call for the Conveyance might happen to be an Infant. If the Trustee had executed a Conveyance of the legal Estate to the Infant at the moment of Mrs. *Langley's* death, it would have vested in him as a Purchaser, and, according to the authorities, would have descended *ut feudum novum*, and the Plaintiff would have unquestionably been entitled as paternal Heir. The Court will, therefore, consider this Case as if the Trustee had done that which it was his duty to do, and had executed a Conveyance immediately on the death of Mrs. *Langley*.

II.—The Case is much stronger, from the circumstance that *Thomas Langley* died an Infant. Is there any authority to show, that, where a Trustee has an Estate on Trust to convey, he is not bound to execute the Conveyance in case the *cestui-que Trust* is an Infant? If such a doctrine were to prevail, the consequences would be that every Trustee would refuse to convey in such a Case; because, if the Infant were to die without maternal Heirs, the Trustee would hold the Estate for his own benefit, although there were a thousand Heirs *ex parte paternâ*. In the pre-

1822.

LANGLEY
v.
SNEYD
and others.

sent Case, *Thomas Langley*, the Son, through whom the Plaintiff claims, was an Infant at the time of his Mother's death, and only lived a few weeks, so that he had no opportunity to call upon the Trustee to execute a Conveyance. It is established, by a long line of Cases (a), that, where there is a Trust that Money shall be laid out in Land, or that Land shall be converted into Money, this Court will consider the act as done which ought to have been done; and, unless there be some act to divest the Property of the character imposed on it by the Trust, this Court will follow the Equity in all its devolutions. If, therefore, a man may thus, in the construction of a Court of Equity, impress on real Estate the character of personalty, and *vice versa*, without the performance of the express act which must have effected the Conversion, why should not the Court follow its own principle in a Case like the present, and hold that a direction to the Trustee to convey has the same effect as if the Conveyance was actually executed, and impressed the same character on the Estate as to the course of the descent? The Case of *Burgess v. Wheate* (b) shows the effect of the legal Estate being considered as remaining in the Trustee.

A Conveyance by the Trustee at the moment of Mrs. *Langley's* death, would have let in both Lines of Heirs. The Party himself being an Infant, and, therefore, incapable of calling for a Conveyance, the Court will consider it as if the duty of the Trustee had been performed. To hold the reverse would be to contravene

(a) *Babington v. Greenwood*, 1 P. W. 532; *Baden v. Earl of Pembroke*, 3 Cha. Rep. 115, 2 Vern. 52; *Guidott v. Guidott*, 3 Atk. 254, &c.; *Ashby v. Palmer*, 1 Meriv. 296, &c. &c.

(b) 1 Eden, 177, and 1 Bla. 123.

an established rule of Equity, and to exclude a whole line of Heirs.

1822.

LANGLEY

v.
SNEYD
and others.

III.—It has been decided, that, where the legal Estate descendible to one Line of Heirs, becomes vested in the Owner of the equitable Estate descending in another Line, there is no Equity between the two Lines of Heirs; but the present Case is quite different, and does not depend on any such Equity. This is not the Case of an Equity attaching in a Person by descent in one Line, and claimed from him by a descendant in a different Line; but the question here is, Who is entitled to call upon the Trustee for a Conveyance, the paternal or the maternal Heir? In *Goodright v. Wells* (c), there is a clear admission that the decision there did not in any degree prejudice such a Case as the present. Mr. Justice *Buller*, in that Case, said, (*Doug.* 779,) after mentioning the Case of the Son having called for a Conveyance, “As the Mother died before he came of age, and she was not directed to convey till then, that Case does not apply. We are to take the facts as they stand. To be sure, if he had taken the legal Estate by Purchase, the paternal Heir would have been entitled; but, as he took it by descent from his Mother, (and the Case would have been the same if we suppose her to have lived beyond his age of Twenty-one Years, and that he never called for a Conveyance) I think the Trust was merged and gone.” The difference in the present Case is, that the time for Conveyance had not arrived during the Lifetime of the Mother.

Mr. *Bell*, for the Defendants, the Heirs *ex parte*

(c) *Doug.* 771. See also *Selby v. Alston*, 3 Vcs. 339.

1847.

LANGLEY
v.
SNEYD
and others.

materna, was desired by the Court to confine himself to the point of Infancy.

The words of the Deed contain no direction to the Trustee to convey, but only a declaration that he is to hold in Trust for Mrs. *Okeover* and her Heirs. The argument for the paternal Heir must go the length of holding, that, if there was a Conveyance to A. B. on Trust for C. D., and C. D. were to die, leaving an infant Heir, A. B. is bound instantly to execute a Conveyance to the Infant Heir. There is no authority for such a proposition. It has never been held, in any Case, that a Trustee, uncalled for, is bound to execute a Conveyance to an Infant, for the mere purpose of changing the Line of Descent; nor is there any principle on which such a decision could be made. The only colour for such a proposition is derived from the principle of the Court, that what ought to be done must be considered as if actually done. That principle only applies where there is an express duty, and a clear benefit to the Party (d). Surely an Estate could not be vested in an Infant by the act of the Trustee, whether the Infant would or not. If such a thing were done, the Infant would have a right to say, when he came of age, that he would have nothing to do with the Conveyance. It was the duty of the Trustee to keep the Estate in the same situation during the whole continuance of the Infancy. The Court never acknowledges any Equity between two Lines of Heirs to alter the course of Descent. It is by no means expressly decided that a Conveyance of the legal Estate will change the course of Descent (e).

(d) See *Lord Compton v. Oxenden*, 2 Ves. jun. 261.

(e) It seemed, however, not to be much questioned in the present case, that where a Party, entitled to an Equitable Estate by Descent *ex parte materna*, procures a Conveyance of the legal Estate to himself, the equitable Fee be-

The VICE-CHANCELLOR:—

I fully adopt the Certificate of the Court of Common Pleas, that the Son took by Descent, and not by Appointment. He took therefore, not under that provision of the Settlement which directed the Trustees to convey to the Appointee of the Mother, but under the subsequent Trust of the Settlement for the benefit of the Mother and her Heirs. As general Trustees for the Heir of the Mother, they had no duty to clothe that Heir with the legal Fee, until they were required to do so; and, in this Case, no such Request was made to them on the part of the Infant Heir. If the Heir had lived to be Adult, and had afterwards died without requesting a Conveyance, I consider it to be clear, even on the argument of the paternal Heir, that the equitable Fee which descended from the Mother would have passed to the maternal Heir.

I am of opinion that the death of the Heir in his Infancy, makes no difference. There is no Equity between the different classes of Heirs; and the equitable maternal Fee must, in this Case, go to the Defendants, the maternal Heirs.

comes merged in the legal, and that the estate will descend *ut feudum novum*, so as to let in the paternal Heirs. See *Doe dem. Balch v. Putt*, Doug. 775. in note; *Goodright v. Wells*, Doug. 779; *Wade v. Paget*, 1 Bro. 363; and also Watk. on Descents, 3d edit. 301, and the Cases there cited, by which this proposition seems satisfactorily established.

1832.

LANGLEY
v.
SNEYD
and others.

1822.

12th November.

Construction.
Will.

SWAYNE v. SMITH.

Testatrix gave all her Personal Property to *E. R.* and in case *E. R.* married, and had a Child or Children, then to go to the Heirs of *E. R.*; but in case *E. R.* should die without a Child or Children, and leave a Husband, then the Interest to him for life; and four Legacies of Stock to certain other Persons. And if *E. R.* should die unmarried, then she gave several small Legacies to other Persons.

E. R. died, without ever having been married.

Held, that the Gift to *E. R.* was subject, in one event, to the Legacies of Stock, and, in another event, to the small Legacies; and that, in the event which happened, the Legacies of Stock failed, but the small Legacies took effect.

THE question in this Cause was as to the construction of a Clause in the Will of Mrs. *Mary Ray*. By her Will, dated 13th February 1787, after giving several pecuniary and specific Legacies, she gave and bequeathed as follows:—

“ *Item*, I give to my loving Sister, *Elizabeth Ray*, all my ready Money, Securities for Money, Monies in the public Stocks or Funds, Plate, Linen, China, and all other my Goods, Chattels and Effects whatsoever and wheresoever; and in case my said Sister, *Elizabeth Ray*, marries, and has a Child or Children, then to go to the Heirs of my Sister, *Elizabeth Ray*; but in case my said Sister should die without a Child or Children, and leave a Husband, then the Interest of the above-mentioned Money to her Husband, during his natural Life, provided he continues a Widower, and no longer: Then I will and bequeath to my loving Cousin, the Rev. *George Swayne* [one of the Plaintiffs], the Sum of 360*l.* Stock Annuity in the new Four *per Cent* Consols. and to his Heirs for ever. Likewise to my loving Cousin, *Walter Swayne*, I will and bequeath the like Sum of 360*l.* Stock Annuity, and to his Heirs for ever. I will and bequeath to my loving Cousin, *William Ray*, the Sum of 360*l.* Stock Annuity, and to his Sister, *Arabella Carpenter Ray*, the like Sum of 360*l.* Stock Annuity: But if my said Cousins, *William* and *Arabella Carpenter Ray*, die without Issue, I then will and bequeath the aforesaid Sums of 360*l.* each Stock Annuity, to the Heirs of my first-mentioned Cousin, *George Walter Swayne*:—If my Sister, *Eliza-*

beth Ray, dies unmarried, I then will and bequeath as follows: *Item*, To my much-esteemed Friend, *Anna Maria Phillips*, I give my Plate, Linen and China, likewise 100*l.* Principal Money, now in Mr. *James Lee Joynes's* hands: To my dear Cousin, *Sophia Joynes*, I bequeath 100*l.* Stock Annuity in the new Four *per Cent.* Consols. provided she pay to my Cousin *Amev Edwards* the Interest of the Sum during her Life:—*Item*, I give to my Cousin, *Ann Mann*, the like Sum of 100*l.* Stock in Ditto, provided she pay to *Barbara Watson* 4*l.* per year during her Life.” And she appointed her said Sister, *Elizabeth Ray*, Executrix of her Will.

1822.

SWAYNE
v.
SMITH.

Elizabeth Ray proved the Will, and acted as Executrix. She died in 1821, *without ever having been married.*

Her Executors filed this Bill against the Legatees of 360*l.* Stock, and also against her residuary Legatees and the Legatees of 100*l.* Stock; and the Bill prayed that the rights of the several Parties might be declared.

Mr. *Bell*, and Mr. *Palmer*, for the Plaintiffs.

Mr. *Sugden* for the residuary Legatees of *Elizabeth Ray*, contended, that according to the plain construction of the Will of *Mary Ray*, *Elizabeth* took an absolute Interest in the whole Fund, According to the words, of the Bequest, the Testatrix first gave to *Elizabeth Ray* an absolute Interest. By the subsequent words, this absolute Gift was not cut down; but it was provided that, in case certain events, which are specified, should take place, *Elizabeth* should take subject to certain Legacies. There is no construction of the Will

1822.

SWAYNE
v.
SMITH.

by which it can be held that both classes of these Legatees, those of 360 *l.* Stock, and the others of 100 *l.* Stock, are entitled, because the events in which they are given are different. The former were to take effect, only in case *Elizabeth Ray* should leave a Husband, and no Child or Children; the latter, in case she should happen to die unmarried. The latter of these events has taken place, not the former, and therefore the 360 *l.* Stock Legacies are not payable. *Smither v. Willock* (a), *Harrison v. Forman* (b), and *Sturges v. Pearson* (c), are direct Authorities against the Construction that both classes of Legatees can take. *Doe v. Roper* (d) is an Authority, in the case of Real Estate, to prove that an absolute Gift, such as in the present Case, is not cut down by subsequent Gifts, such as in the present Case, which must be considered only as Charges to take effect in certain events.

Mr. *Pemberton*, for the Legatees of 360 *l.* argued that their Legacies were to take effect in case *Elizabeth Ray* died without a Child or Children, whether married or unmarried. The word "*Heirs*" is never to be taken as synonymous with the word *Children*. There is only one Case, that of *Crawford v. Trotter* (e), in which those words were held to be synonymous, and it was so held there because the phrase was "*Heirs (say Children)*." In the present Case there is nothing to show that they were intended to be synonymous. The inference is directly the reverse; for here the Testatrix, wherever she meant an absolute Gift, gave to the Party and "*his Heirs for ever*." In this view of the Case, she meant to give *Elizabeth Ray* an Estate for Life,

(a) 9 Ves. 233.

(b) 5 Ves. 207.

(c) 4 Madd. 411.

(d) 11 East, 518.

(e) 4 Madd. 361.

and to give the absolute Interest only, in case she married, and had a Child or Children; for it is only when speaking of that event that she used the word *Heirs*. The condition on which the Legacies of 360 *l.* Stock were to take effect, was that of *Elizabeth Ray* leaving no Issue, and not that of leaving a Husband. *Murray v. Jones* (f), *Jones v. Westcomb* (g), *Doe v. Shephard* (h), are Authorities to show that Claims of this sort do not prevent the Bequest over from taking effect. It would be monstrous to suppose that this Textatrix, who manifested a clear intention to dispose of the whole of her Property, should, nevertheless, in the event of *Elizabeth Ray* dying without ever having been married, leave it undisposed of except as to a few Legacies of 100 *l.* Stock.

1822.

SWAYNE
v.
SMITH.

Mr. Boteler was for the Legatees of 100 *l.* Stock, which, from the state of the Assets, could not be paid in full, in case the Court should hold that the 360 *l.* Stock Legacies took effect.

Mr. Sugden, in reply :—

It is clear this was meant an absolute Gift to *Elizabeth Ray*, subject to the charge of certain Legacies in certain Events: because the words used in giving effect to those Legacies which follow the first Gift to *Elizabeth*, are all words of contingency, such as—*but if*, and, *in case*. Words cannot be more express to provide for different events than those which specify when the two different classes of Legacies should take effect. *Jones v. Murray*, and the rest of the Cases cited on the other side do not apply, because the question in them arose from the

(f) 2 V. & B. 313.
(g) Pre. Cha. 316.

(h) Doug. 75.

1822.

SWAYNE

v.

SMITH.

Wills not containing any words to describe certain contingencies which had happened.

The VICE-CHANCELLOR:—

It is not very easy to find a satisfactory reason why the Testatrix should have intended that the three Legatees of the three Sums of 360*l.* Stock should take if the Sister died without Child or Husband, having been married, which would be the effect of this Will; and that the same Legatees should not take, if the Sister died without Child or Husband, not having been married. But Courts of Justice are not at liberty to act upon conjecture, against the clear expressions of a Will. And this Lady has told us, in plain words, what Legacies are to take effect in the event of her dying unmarried; and I cannot intend that she meant more than she has expressed. It may be, that, in this construction, I am not executing the purpose of this Testatrix. But the security of Property requires rather that a possible purpose should be disappointed, than that Courts of Justice should act upon any supposed intention which is not to be collected from the language of the Will.

S. C. Nye v Mosley 2 Sim. 161

SOPHIA KNYE, Spinster, and HENRY KNYE and
 CHARLES KNYE, Infants, by the said SOPHIA
 KNYE, their Mother and next Friend - Plaintiffs;
 and
 JOHN MOORE - - - Defendant.

1822.
 13th November.

A married Man, after having lived in adultery with a woman, and had Children by her, executes a Deed, providing for her and the Children in case of his death, and deposits it in the hands of his Attorney, but afterwards procures possession of it himself. — Held, on Demurrer, that the Woman and her Children can maintain a Bill to compel him to deliver up this Deed: That the Person with whom the Deed had been deposited need not be made a Party, as no breach of Trust was charged against him;—and that the Bill was not multifarious, though it also sought performance of an Agreement to pay an Annuity to the woman, which could not be decreed in Equity.

THE Bill stated, that the Plaintiff, *Sophia Knye*, became, in the year 1808, Servant to the Defendant, and for four years conducted herself with strict propriety: That, in the year 1811, some differences having arisen between the Defendant and his Wife, the Defendant began to pay very particular attention to the Plaintiff, *S. Knye*, and proposed to her to cohabit with him: That she at length yielded to his solicitations, and agreed to his proposals: That, in 1812, Defendant fitted up a Cottage in the neighbourhood for her, where she resided and cohabited with him until some time in the year 1816, and in the course of such Cohabitation was delivered of four Children, of whom the Defendant was the Father, namely, the Plaintiffs *Henry* and *Charles*, and two other Children, since dead: That, in the year 1816, the Defendant having several legitimate Children, became desirous of putting an end to the connexion, and of making a due Provision for the Plaintiff, *Sophia Knye*, and the other Plaintiffs, her Children; and, for that purpose, wrote and sent a Letter to her, dated 21st August 1816, whereby he informed her that his absence from *England*, which would take place immediately, made their Separation necessary; and requested her to quit the Cottage, and assured her that so long as the Children were maintained at her Expense, and her Conduct justified her claim upon him, she should be provided for by an Allowance of 100*l.* a year,

1822.

KNYE
v.
MOORE.

to be paid by his Bankers; and that, if any accident happened to him, she and the Children were provided for by a Deed executed by him, and left in Trust with his Attorney, Mr. H. : That, being extremely desirous of putting an end to the connexion, she agreed to quit the Cottage, and accept the Provision; and that, in pursuance of the Agreement, she gave up possession of the Cottage, and accepted the Provision of 100 *l.* a year, and that she had, ever since August 1816, wholly supported her Children, and conducted herself with propriety: That the Defendant, for a short time after entering into the Agreement, remitted to her, from time to time, various sums of Money, on account of the promised Provision; but that, since July 1820, he had ceased to pay her any Sum on account thereof, and had also procured the Deed, mentioned to have been executed by him for the benefit of her and her Children, to be delivered into his Custody or Possession; and that he refused to deliver up the same, or to discover the Contents thereof.

The Bill charged, that it was fully agreed between the Defendant and the Plaintiff, *Sophia Knye*, for the purpose of putting an end to the connexion between them, that the Defendant should, during his Life, pay her the annual Sum of 100 *l.* as a Provision for the support and maintenance of herself and Children, and that the Letter above mentioned contained the Terms of this Agreement; and that the Agreement, was by the Letter, duly reduced into writing, and was, in Equity a good and valid Agreement, on the part of the Defendant, to pay to the Plaintiff, during his Life, the annual Sum of 100 *l.* and that the Payments made by him were acts of part performance of the Agreement.

The Bill prayed a specific Performance of this Agreement, and that the Defendant might be decreed to pay to the Plaintiff, *S. Knye*, the Arrears and future Payments of the Annuity, during his Life, she being willing to support and maintain the Children; and that the Defendant might be decreed to deliver up the Deed, and that it might be deposited in safe Custody.

1822.

KNYE
v.
MOORE.

To this Bill the Defendant demurred, for want of Equity.

Mr. *Bell*, and Mr. *Lovat*, in support of the Demurrer:—

First. This is not one of those Cases where a Man, having debauched a Woman, makes a Provision for her; but this is the case of a married Man, and comes within the Doctrine laid down in *Priest v. Parrott*, (a). That Case has been cited in the House of Lords, and the Doctrine of Lord *Hardwicke* acknowledged; it was also cited to the Master of the Rolls in *Matthews v. L.* (b), and not objected to. There is no Case in which this Court has held a Deed like the present, made by a married Man, to be valid (c).

Secondly. The Demurrer is also sustainable *ore tenus*, for multifariousness. The first part of the Bill states an Agreement with the Mother only, by which she was to receive 100*l.* a year, in consideration of former Cohabitation. As to this, she alone is entitled to sue; she cannot join to that Claim another in which she and other Persons are jointly interested; for, as to the other matters, she claims jointly with her Children.

(a) 2 Vez. 160.

(b) 1 Madd. 558.

(c) See *Spicer v. Hayward*, Precedents in Chancery, 114, and the *Marchioness of Annandale v. Harris*, 2 P. W. 432. and 3 Bro. P. C. 445.

1822.

KNYE
v.
MOORE.

Thirdly. Another ground of Demurrer is, that, if they come here for this Deed, the Person in whose hands the Bill states the Deed to have been deposited, ought to have been a Party to this Suit.

Mr. *Evans*, in support of the Bill, said that this Case was distinguished from *Priest v Parrott* by the circumstance of there being Children, who are innocent Parties.

The VICE-CHANCELLOR:—

The Agreement contained in the Letter stated in the Bill, must be considered as merely voluntary, therefore, a Bill will not lie for the performance of it. But it is a very different question, whether the Defendant must not answer as to the Deed of Settlement, which he is alleged to have executed and delivered to a Trustee for the Plaintiffs, and, afterwards, to have improperly obtained again from the Trustee.

It seems to be established by the Case of the *Marchioness of Annandale v. Harris* (d) (which afterwards went to the House of Lords), and by *Ord v. Blackett*, and *Carew v. Safford*, there cited, that Courts of Equity will lend their aid to enforce Securities given as the *premium pudicitiae*. Lord *Hardwicke* states (e), that, in *Annandale v. Harris*, it appeared that Lord *Annandale* was not married at the time of his connection with the Defendant. No such circumstance is stated in the Report, nor does it appear to have formed any ingredient in the Decision. The principle of that Case is, that, if a Man misleads an innocent Woman, it is but justice and reason that he should make her reparation; and, therefore, notwithstanding the immorality of the

(d) 2 P. W. 432, and 3 Bro. P. C. 445. (e) 2 Vez. 161.

connection which led to the provision, a Court of Equity will lend its aid to enforce it. If a Woman be the victim of a married Man, it is not less justice and reason that he should make her reparation than if he were unmarried; and the deeper shade of immorality in the connection is not a very tangible or satisfactory ground of distinction.

1822.
KNYE
v.
MOORE.

In the Case of *Priest v. Parrott*, there were no Children. Now here, in the first place, the Deed is a provision for the mother and her Children, and they are Co-Plaintiffs; and if I was to decide that the mother could not maintain this Bill, there is no principle that the Children could not. The Case of the Children here makes it quite clear that this general Demurrer cannot be maintained.

It is then said, that there is a defect of Parties; because the Person to whom the Deed was delivered is not before the Court.

If the Trustee had delivered up the Deed in breach of his Trust, then he ought to have been before the Court, in order to be charged in respect of such Breach, but not otherwise.

Another objection is taken to the Bill, as being multifarious; because it seeks for the performance of an Agreement under which the mother alone is entitled, and joins to this another Claim, in which she is interested jointly with her Children. But the whole Case of the mother being properly the subject of one Bill, the Suit does not become multifarious because all the Plaintiffs are not interested to an equal extent.

Demurrer overruled (c).

(c) See *Gray v. Mathias*, 5 Ves. jun. 286, and *Binnington v. Wallis*, 4 B. & A. 650.

VOL. I.

F

A case was after-
wards sent to K. B.
The cause then came
on to be heard before
the P. C. The Judge
was ordered to
decide with a new
bond with a
condition similar
to that of the former
one & to pay the
costs of the suit &
of the case at law.
2 Nov. 1861 -
Nye & Morley

1822.

14th November.

*Specific
Performance.
Nuisance.*

GORTON v. SMART and COOKE.

THIS was a Bill for the specific Performance of an Agreement to grant a Building Lease.

Specific Performance of an Agreement to grant a Building Lease, decreed generally, although the Plaintiff had built a Brew-house upon part of the Land comprised in the Agreement, and thereby injured the adjoining Property of the Lessor.

In March 1819, Articles of Agreement were entered into between *Cooke* and *Smart*, by which *Cooke*, in consideration of the Covenants, Conditions and Agreements therein contained, agreed to demise to *Smart*, for a term of ninety-nine years, at a yearly rent of 300*l.* a Piece of Ground in *Lambeth*, for the purpose of building; and it was agreed on the part of *Smart*, that all the Houses which he or his Assigns should think fit to build, or cause to be built on the Ground, should not be less than those usually denominated Third and Fourth-rate Houses; and that all the Timber or Wood used in the said Houses or Buildings should be of such scantling or dimensions as are used in good and well-built Houses of the corresponding Rate: That the Leases to be made of such Houses should contain all Covenants, Clauses and Agreements usual in Leases of the like nature, and such other Covenants and Clauses as should be agreed upon between the parties (*Cooke* and *Smart*) from time to time, for the advancement and improvement of the Undertaking, and of the Estate of *Cooke*.

These Articles contained other Provisoes, in none of which, however, was there any thing further expressed as to the nature of the Houses to be built. But where reference was made to the Houses proposed to be built, the words "Houses or Buildings," and in one instance "Messuages or Tenements," were used. There was also a proviso, empowering *Cooke*, his Heirs and Assigns, and his and their Agents and Surveyors, to enter

upon the Ground agreed to be demised, to examine and inspect any of the Buildings that should be carrying on, and to take such minutes of the state thereof, as they should think fit.

1822.

GORTON
v.
SMART.

Under this Agreement, *Smart* entered into possession of the Ground, and in May 1820, signed an Agreement with the Plaintiff, *Gorton*, to underlet to him a small part of it for a Term of ninety-seven years, at a yearly Rent of 14 *l.* for the purpose of erecting Buildings intended for a small Brewhouse, and to grant him a Lease, which should contain the customary Clauses, when the intended Buildings were finished.

The Plaintiff entered into Possession under this Agreement, and built the Brewhouse. He then applied for his Lease; but *Cooke* insisted that it was contrary to the Terms of his Agreement with *Smart* that any Brewhouse or Manufactory should be erected on the Land; and objected to grant the Lease, because the erection of a Brewhouse was injurious to his Property in that Neighbourhood. But at the same time he offered to grant a Lease to the Plaintiff, provided he would adopt the requisite means for consuming the Smoke occasioned by the Brewery, so as to prevent it from being obnoxious to the Neighbourhood. The Plaintiff refused to adopt the means of consuming the Smoke, and filed this Bill, praying for a specific Performance.

It was insisted by the Bill, that *Cooke* was aware of the Agreement between the Plaintiff and *Smart*, and did not object to the erection of the Brewhouse till it had been completed, although he knew the nature of the Building while it was in progress. But this was

1822.

GORTON
v.
SMART.

denied by *Cooke* in his Answer; and the Evidence of the Plaintiff only proved that *Cooke* lived in the Neighbourhood, and might have known the nature of the Building before it was completed.

On the part of *Cooke*, it was proved that his Property in Houses in the Neighbourhood would be depreciated by the erection of this Brewhouse.

The Cause now came on to be heard.

Mr. *Horne*, for the Plaintiff.

Mr. *Sugden*, and Mr. *Munro*, for the Defendant *Cooke*, insisted, *First*, that a Brewhouse was not a Building within the Terms of the Agreement; *Secondly*, that the Plaintiff having rejected the offer of a Lease on the condition of his adopting the means for preventing the Brewhouse from being a Nuisance and a Damage to the Defendant's Property, was not entitled to a Lease on any other terms; *Thirdly*, that it was proved that the Brewhouse, as now used, was an injury to the Property of the Defendant.

The VICE-CHANCELLOR :—

There is no Covenant in the Agreement to restrain the building of a Brewhouse. A Brewhouse is not necessarily a Nuisance, and if it be so used as to become a Nuisance, the Law is open to the Defendant (a).

Decree for a specific Performance.

(a) See *Williams v. Cheney*, 3 Ves. 59.

*Ser. Lg. Jan. 123
Tues. & R. 68*

1822.
22d July,
19th November.

VEZEY v. JAMSON.

THIS Suit was instituted to obtain the opinion of the Court as to the Disposition of the Residuary Estate of *John Vezey*.

Trust.

By his Will, dated 5th December 1814, which was executed so as to devise Freehold Estates, after disposing of his Real Property, and giving various pecuniary Legacies (one of which was to a charitable Institution) he gave all the Residue of his Estate to his Executors, upon special Trust and confidence, nevertheless, to apply and dispose of the same in or towards such charitable or public Uses or Purposes, Person or Persons, or otherwise, as he might, by any Codicil or Codicils to that his Will, or by Memorandums in his own Handwriting, direct or appoint, and as the Laws of the Land would admit of; and, in default of any such Directions or Appointments, then, as to the whole Residue, or in case of any such Directions or Appointments, and the same should not be an entire Disposition of such Residue, then, as to such part of such Residue concerning which no such Direction or Appointment should be made, *upon Trust*, to pay and apply the same in or towards such charitable or public Purposes as the Laws of the Land would admit of, or to any Person or Persons, and in such Shares and Proportions, Sort, Manner and Form, so as his Executors, or the Survivor of them, or the Executors or Administrators of such Survivor, should, in their or his discretion, will and pleasure, think fit, or as they should think would have been agreeable to him, the said Testator, if living, and as the Laws of the Land did not prohibit, but admit of.

Testator gives the Residue of his Estate to his Executors on Trust, in default of appointment, to dispose of it at their pleasure, either for charitable or public Purposes, or to any Person or Persons, in such Shares, &c. as they in their discretion should think fit: Held, that the Trust is too general and undefined to be executed by the Court: That the Executors cannot take, because it is given expressly on trust; and that the next of Kin are entitled.

1822.

VEZEY
v.
JAMSON.

The Testator never by any Codicil or Memorandum specified any purpose to which the Residue was to be applied.

The Plaintiff, as next of Kin, claimed the Residue as undisposed of; and, on behalf of the *Attorney General*, it was insisted, that it must be applied to charitable Purposes, under the direction of the Court, pursuant to the wishes of the Testator.

When the Cause first came on to be heard, the *Vice-Chancellor* referred it to the *Master*, to inquire who were the next of Kin of the Testator at the time of his death, that they or their Representatives might all be made Parties to this Suit.

This was done accordingly; and on the 22d July 1822, the Cause was heard for further directions.

It did not appear by the Pleadings whether any of the next of Kin were Legatees or Devisees under the Will or Codicils.

Mr. *Bell*, Mr. *Shadwell*, and Mr. *Trower*, appeared for the various Parties (a).

The question was, whether the Residuary Estate was well given to charitable Uses, or belonged to the Trustees for their own use, or to the next of Kin.

The following Cases were cited in the course of the Argument, *Morice v. Bishop of Durham* (b), *Attorney General v. Herrick* (c), *Price v. Peacock* (d).

(a) As the Cause was heard in July last, we have no note of the Argument.

(b) 9 Ves. 399, and 10 Ves. 522.

(c) Amb. 712.

(d) Finch, 445; 2 Lev. 267.

The VICE-CHANCELLOR:—

In the event of no Appointment of this Residuary Estate by the Testator himself, he has given it to Trustees to dispose of it at their will and pleasure, either for charitable Purposes or public Purposes, or to any Person or Persons, in such Shares and Proportions, Sort, Manner and Form, as they in their discretion shall think fit, and the Laws of the Land shall not prohibit. It is in effect a Gift in Trust, to be absolutely disposed of in any manner that the Trustees think fit, which is consistent with the Laws of the Land, and so that it be not applied for their own use and benefit.

1822.
VEZEY
v.
JAMSON.

The Testator has not fixed upon any part of this Property a Trust for a charitable Use, and I cannot therefore devote any part of it to Charity. He has given it to the Trustees expressly upon Trust, and they cannot therefore hold it for their own benefit. The necessary consequence is, that the purposes of the Trust being so general and undefined that they cannot be executed by this Court, they must fail altogether, and the next of Kin become entitled to the Property. The Case of *Morice v. Bishop of Durham* is precisely in point (e).

(e) See *Mills v. Farmer*, 1 Meriv. 55, and 19 Ves. 483, and the Cases there cited. In the *Attorney General v. Doyley*, 7 Ves. 58, *in not.*—the Testator gives Real and Personal Estate to Trustees, in Trust, (failing other Limitations) to dispose thereof to such of his Relatives of his Mother's side who were most deserving, and in such manner and proportion as his Trustees should think fit; to such charitable Uses as they should think most proper and convenient. The Court decreed one Moiety to all the Relations on the Mother's side, within the degree of third Cousins; and the other Moiety for charitable Purposes; and directed the *Master* to approve a Scheme in which the poor Relations, not partakers of the first Moiety, were *ceteris paribus*, to be preferred. See *Moggridge v. Thackwell*, 7 Ves. 36, and the Cases there referred to.

1822.

30th November.

BALFOUR v. FARQUHARSON.

A Defendant who has put in three insufficient Answers, and is in custody for want of a fourth, is entitled to his discharge immediately on filing a fourth Answer.

IN this Case, the Defendant had put in Three insufficient Answers, and, for want of a Fourth, he was committed to the Fleet.

Mr. *Daniel* moved for his Discharge, upon the Six Clerk's Certificate, that a Fourth Answer had been filed; and cited *Lord Bacon's Orders*, *Beames's Orders Chan.* 28, and *Lord Clarendon's Orders*, *Ibid.* 183, and *Bailey v. Bailey (a)*.

Mr. *Agar* opposed the Motion, and cited an Order of the 30th April 1700 (*b*), and contended, that under that Order the Defendant was to be kept in Custody until the *Master* had reported the Fourth Answer to be sufficient.

The *Registrar*, on being applied to by the *Vice-Chancellor*, stated, that there was no instance of the Order of 1700 having been acted upon, and that the Practice had always been conformable to Lord *Clarendon's* Order.

The *Vice-Chancellor* directed the Motion to be made before the *Lord Chancellor*.

Shortly afterwards Mr. *Daniel* returned, and stated to the Court, that the *Lord Chancellor* had said, that, if his Honor was satisfied that the Order of 1700 had never been acted upon, he would not be the first to act upon it.

The VICE-CHANCELLOR:—

Then take your Order.

(a) 11 Ves. 151.

(b) First published by Mr. *Beames*, *Ord. Cha.* 317.

JOHNSON v. ASTON (a).

1822.
20th November.

MOTION to pay Money into Court, on admission in the Answer of the Defendant, an Executor.

Money admitted by an Executor to be in the hands of his Partner, is in his own hands for the purpose of being ordered to be paid into Court.

The Defendant was a Partner in a mercantile House at Trinidad, and a Bill of Exchange had been drawn on his House for the Money in question, in favour of the Testator, by a Party, who, it was admitted, had the Amount of the Bill in the hands of the Partnership. The Bill was long over due, and the Defendant, by his Answer, admitted that his Partner in Trinidad, had debited the Drawer with the amount of the Bill, though the Money had never been actually remitted.

The VICE-CHANCELLOR :—

The Money of the Executor, admitted to be in the hands of the Banker, is in his own hands for the purpose of such an Application as the present. The Partnership are to be considered as the Bankers of the Executor. The fact that the Money is abroad is a reason for giving a longer time for Payment into Court.

(a) *Ex relations.*

1822.

25th November.

BRYSON v. WHITEHEAD.

Restraints on Trade.

A Trader may sell a Secret in his Trade, and restrain himself generally from the use of it.

Specific Performance decreed of an Agreement to sell the Goodwill of a Trade, and the exclusive use of a Secret in Dying.

THIS was a Bill for the specific Performance of an Agreement, for the sale of the Goodwill of a Trade, and of a Secret in Dying.

The Plaintiff had for many years carried on the trade of a Dyer in Spitalfields, and had a particular mode of dying Bombazeens and Stuffs. None but himself and his Son-in-law, one *Portlock*, knew the secret of dying Stuffs in that mode; and this secret was esteemed of great value.

In December 1820, *Bryson* being about to retire from Business, agreed to sell the Goodwill of his trade, together with the Plant and Fixtures, to the Defendant for 1,500 *l.*, and the exclusive benefit of the Secret for 1,000 *l.* Heads of the Agreement in writing were signed by both Parties, and were expressed as follows: "Heads of Agreement between Mr. *Bryson*, of, &c. and Mr. *John Whitehead*, of, &c. Mr. *Bryson* possesses a Secret in the art of dying Bombazeens, Princes Stuffs, and other Goods, which is known to himself and Son-in-law, *Samuel Portlock*, only: Mr. *Bryson* is about to retire from his Business, and therefore he has agreed with Mr. *Whitehead* as follows: Mr. *Whitehead* is to pay him, for himself and Son, 1,000 *l.* for the Secret, and 1,500 *l.* for the Plant and Fixtures upon his Premises, and for the Goodwill of the Trade, and to have the Premises leased or assigned at the following Rents: [*then followed a description of the Buildings, and the amount of the Rent*]. Mr. *Bryson* to make the Secret known to Mr. *Whitehead*, and instruct him in the Art, and to

1822.

BRYSON
v.
WHITEHEAD.

make over the Trade and Goodwill, and use his endeavours to secure it to Mr. *Whitehead*, by circular Letters, and other usual means; and he is not himself to engage in the business of a Dyer for Twenty-years; and he is to engage that his Son-in-law will not divulge the Secret, or engage in the business of a Dyer for the same term as Mr. *Bryson*; and that neither of them shall do any thing to prejudice Mr. *Whitehead* in the Trade of Mr. *Bryson*, and in securing and continuing the Business of the connections of Mr. *Bryson*; and he is to procure his Son-in-law to enter into an Engagement to the same effect to Mr. *Whitehead*: An Inventory of the Plant to be delivered, &c. Possession to be delivered to Mr. *Whitehead* on payment of the 1,000 *l.*, and a Circular immediately issued, so that the Trade may be continued in the usual manner, under the direction of Mr. *W.*, with the assistance of Mr. *Bryson*, who is to divulge the Secret, and instruct Mr. *W.* therein immediately after the payment of the 1,000 *l.*: The 1,500 *l.* to be paid upon the Leases, &c. being executed according to this Agreement, which are to be executed within a Month, or sooner: Deeds and Instruments with full and proper Clauses, to be prepared and executed upon the basis of this Agreement, and the expense divided."

Whitehead forthwith paid the 1,000 *l.* and was put into Possession of the Trade, and had the Secret communicated to him.

Bryson and his Son-in-law soon afterwards executed a Bond to *Whitehead* in the common form, with a Penalty of 2,000 *l.* reciting the Agreement, and with the condition, that they or either of them would not, for Twenty years, in any manner exercise the trade of Dyers

1822.

BRYSON
v.
WHITEHEAD.

within the distance of Fifty miles from *Spitalfields*, and would not, at any time, disclose the Secret.

Whitehead, however, thought that this Bond (which was prepared by *Bryson's* Solicitor) was not sufficiently restrictive, and that *Bryson* and his Son might, at any time, without incurring any Penalty, resume their trade at any place beyond the distance of Fifty miles from *London*; as at *Kidderminster*, *Norwich*, or in *Yorkshire*, where Bombazeens and Stuffs are principally manufactured. For this reason he insisted on a Deed of Covenant more restrictive in its terms, and with Clauses for liquidated Damages in case of breach of the Agreement.

Disputes arose in consequence, as to the terms of the Deeds to be executed under the Agreement, and *Bryson* filed this Bill for a specific Performance, and for payment of the 1,500*l*.

Mr. *Heald*, and Mr. *Whitmarsh*, for the Plaintiff.

Mr. *Bell* and Mr. *Theobald*, for the Defendant, submitted it to the judgment of the Court, whether the Agreement was of such a kind as could be carried into execution. It was the essence of the Agreement that neither *Bryson* nor his Son-in-law should, for Twenty years, carry on the Trade of Dyers. If, however, the Agreement was to be acted on so as to confine the Restriction on exercising the Trade to places within Fifty miles from *London*, then the Defendant would not have that Benefit which he had stipulated for by the Agreement; because the Plaintiff, or his Son-in-law, by removing to *Norwich*, or any other convenient Situation beyond the distance of Fifty miles, would come

into direct competition with him. If considered as an Agreement not to exercise the trade of a Dyer any where for Twenty years, it was void by the policy of Law, *Mitchell v. Reynolds* (a). If, on the other hand, it was to be acted on so as to limit the Restraint on carrying on the trade to the distance of Fifty miles from London, the Defendant would lose the benefit for which he had contracted.

1821.
BYSON
v.
WHITEHEAD.

The VICE-CHANCELLOR:—

Although the policy of the Law will not permit a general restraint of trade, yet a Trader may sell a Secret of Business, and restrain himself generally from using that Secret. Let the *Master*, in settling the Deed which is to give effect to this Agreement, introduce a general Covenant to restrain the use of the Secret for Twenty years, and a limited Covenant, in point of locality, as to carrying on the ordinary business of a Dyer, both Parties being willing that the Agreement should be so modified.

The Decree therefore referred it to the *Master* to settle a proper Deed (b).

(a) 1 P. W. 181.

(b) It is a very ancient part of the Policy of the Law to discourage restraints on Trade, as being injurious to the Public. But no Judge has carried his abhorrence so far as is reported of *Hull, J.* in the *Year Book*, 2 Hen. 5. There a Dyer was bound that he should not use his Craft for Two years, and *Hull* held that the Bond was against the Common Law, "and by G—d (said he), if the Plaintiff were here, he should go to prison till he had paid a Fine to the King." In *Mitchell v. Reynolds*, 1 P. W. 181, *Parker, C.J.* in his admirable exposition of the Laws on this subject, excuses the transport of Mr. Justice *Hull's* indignation, on the ground that it was excited by a case of most gross fraud and villainy. As to the general doctrine, see *Davis v. Mason*, 5 T. R. 118; *Chesman v. Mosely*, 1 Bro. P. C. 334; *Shackle v. Baker*, 14 Ves. 468; *Cruttwell v. Lye*, 17 Ves. 335; *Harrison v. Gardner*, 2 Madd. 198, &c.

1822
12th & 26th Nov.

BAYLEY v. SNELHAM.

Description of illegitimate Child.

J. S. having contracted a marriage, which was void *ab initio*, and having one Son of that Marriage, made his Will, and gave the Residue of his personal Estate to all his Children by his reputed Wife: Held, that the Son, being born at the date of the Will, was entitled.

THIS was a Bill filed to carry into execution the Trusts of the Will of *John Snelham*; and the only question in the Cause was, as to the validity of a Bequest to the Children of the reputed Wife of the Testator.

The Will was dated 21 August 1800: and the Testator, after reciting, that he had lately married *Jane Whiteside*, the Sister of his deceased Wife, *Mary Snelham*, in *Scotland*, according to the form and usage of the Church there, gave and bequeathed unto his Wife, *Jane Snelham*, all his Household Goods, Plate, Linen, China, Books and Wearing Apparel; and he gave the Residue of his Personal Estate to *Thomas Bayley* and *Thomas Whiteside*, their Executors, Administrators and Assigns, upon Trust, to sell, and to place out the produce at Interest, and to apply the Interest and Proceeds thereof unto his Wife *Jane*, for her natural Life; and, from and after her decease, to call in the Principal Monies so to be placed out, and to pay and apply the same *Unto and amongst all and every the Child and Children, or to an only Child, as the case might be, of him the said Testator and his Wife Jane*, the whole of the said Trust Monies to be paid to such Child or Children at his, her, or their age or respective ages of twenty-one years, or day of Marriage: And upon Trust, in the mean time, after the decease of his said Wife, to pay and apply the Dividends, Increase and Proceeds thereof, for and towards the Maintenance and Education of such Children or Child, until their or his or her respective Shares or Share should become payable. And the Tes-

1822.

BAYLEY
v.
SNELHAM.

tator declared it to be his Will and Mind, that his Wife *Jane*, and her Children, should take the Provisions thereinbefore made for them in the same manner as if she had been married to him according to the usage of the Church of England, and such Marriage had been valid according to the Laws of England. And in case all and every the Child and Children by him begotten, and to be begotten on the body of his said Wife, *Jane*, should happen to depart this Life under the age of Twenty-one years, and unmarried, then he gave one Moiety of the Trust Monies, unto his said Wife *Jane*, her Executors, Administrators and Assigns; and he directed his Trustees, and the survivor of them, and the Executors and Administrators of such Survivor, to pay and apply the Interest and Proceeds of the remaining Moiety of the Trust Monies unto his Sister, *Ann Goodyear*, during her natural Life; and from and after her decease, then he gave and bequeathed the same Moiety unto and equally amongst *Richard, Elizabeth, Mary, and Ann Goodyear*, the four Children of his Sister *Ann Goodyear*, share and share alike.

At the time when the Testator made this Will, he had one Son by *Jane Snelham*. This Son was the only issue of the Marriage.

The Bill charged, that the Marriage of the Testator with *Jane Snelham*, the Sister of his former Wife, was, according to the Law of Scotland, not merely voidable, but absolutely void, *ab initio* (a).

(a) This marriage, by the Law of Scotland, was null and void. "Marriage is null where it is contracted within the degrees of Propinquity or Affinity forbidden by the Law." Ersk. Inst. 92. sec. 97.

"The degrees prohibited by the Law of Moses in Consanguinity are in every case virtually prohibited in Affinity;

1822.

BAYLEY
v.
SNELHAM.

Ann Goodyear, the Legatee for Life of the Residue, failing the preceding Limitations, was a Party to the Cause in that character, as well as because she was the Personal Representative of Three of her Children named in the Bill, who were dead. Her only surviving Child had married, and, with her Husband, was made a Party to the Cause.

By their Answer, these Parties stated, that they were willing to admit, and did thereby admit, that *Jane Snelham* was lawfully married to the Testator, and that *John Snelham* was the lawful Son of the Testator; and they said, that they had never set up any Claim under the Will, in the events that had happened; nevertheless, if the Court should be of Opinion that they *had* any Interests under the Will, and were, therefore, necessary Parties to the Suit, they claimed all such Rights and Interests therein as they might be entitled to.

The Cause now came on to be heard.

Mr. Heald, and *Mr. Rose*, for the Plaintiffs, who were the Representatives of the acting Executors of the Will.

Mr. Bell, and *Mr. Roupell*, for *John Snelham* and his Mother, insisted, that, as *John Snelham* was born at the time when the Will was made, there was a sufficient description of him in the Will, even if it should turn out that the Marriage was void, *Wilkinson v. Adam* (b). If

"and by the Act 1567, the Prohibition is equally broad in the
"degrees of Affinity, as in those of Consanguinity.—Thus, one
"cannot marry his Wife's Sister, more than he can his own.
"In all this matter, the rules are the same by the Law of
"Scotland, whether the Parties be related by full or by half
"blood."—*Ersk. Inst.* 93, sec. 9.

(b) 1 V. & B. 422.

they were right in that construction, it would not be necessary to direct any inquiry as to the Validity of the Marriage.

1822.

BAYLEY
v.
SNELHAM.

Mr. Pemberton, for the other Legatees.

The VICE-CHANCELLOR:—

In the Case of *Wilkinson v. Adam*, the words of Gift were, “*To the Children which I may have by the aforesaid Ann Lewis, and born at my decease, or Six months after*”. It was held to be equivalent in expression to a Gift to “*All the Children which I now have, or hereafter may have by the said Ann Lewis, who shall be living at my decease, or born within Six months after*;” and, consequently, to be a sufficient description of the Children of *Ann Lewis*, living at the time of the Will, who had acquired the reputation of being the Children of the Testator.

This Case is stronger for the Children than that of *Wilkinson v. Adam*, being an express Gift to all the Testator's Children by the said *Jane*, begotten or to be begotten, and necessarily, therefore, including the Child of *Jane*, then born, who had acquired the reputation of being the Child of the Testator.

Decree, That *John Snelham* is entitled (c).

(c) In *Wilkinson v. Adam*, 1 V. & B. 422. the doctrine on this subject, and the various authorities, were very fully discussed. See also *Swaine v. Kennerley*, 1 V. & B. 469. *Woodhouselee v. Dalrymple*. 2 Meriv. 419.

Amold v. Preston 18 Ves. 288.

Earle v. Wilson 17 Ves 528

Beachcroft v. Beachcroft 1 Madd. 630

Kenebel v. Scaffell 2 East 530

VOL. VI.

G

Blodwell v. Edwards 10. El. 509.

Mortimer v. West 3 Russ. 370.

1822.

27th November.

In the Matter of a FRIENDLY SOCIETY.

A Sum of Money in the Funds, standing in the name of two Trustees of a Friendly Society, one of whom had absconded, ordered to be transferred by the other Trustee into his own Name, jointly with that of another Trustee, elected in the room of him who had absconded.

THIS was the Petition of the President, Stewards, and *John Allen*, one of the Trustees of *The Firm and Friendly Society*.

It stated that the Petitioner, *John Allen*, and one *John Burghall*, had been elected joint Trustees of the Society, and that a Sum of 100 *l.* 3 *l.* per Cent. Stock was standing in the Books of the Bank of England, in their joint Names: That *John Burghall* had absented himself from the Society, and that his then place of Residence was wholly unknown, and that, in consequence of his absence, the President had been elected Joint Trustee with *John Allen*, in the room of *Burghall*. The Petition therefore prayed that the Sum of 100 *l.* Stock might be transferred into the names of the President and *John Allen*.

There was an Affidavit of these Facts.

Mr. *Farrer*, for the Petition, referred to the Act 36 Geo. 3, c. 90, by which it is provided, that where one of several Trustees is absent out of the jurisdiction, or shall be Bankrupt, or Lunatic, or shall refuse to transfer, or it shall be uncertain or unknown whether such Trustee be living or dead, the Courts of Equity may, in any Cause depending, make an Order of Transfer by the other or others of such Trustees. By the Act 57 Geo. 3, c. 39, intitled, "An Act to extend the Provisions of the " 36th Geo. 3, c. 90, and the 52d Geo. 3, c. 158, to Charity and Friendly Societies," it is provided, that the Provisions and Remedies of these two Acts should extend

to all cases of Petitions on which Courts of Equity are by Law authorized and empowered to make summary Orders without Suit, in matters of Charity, or in matters of Benefit or Friendly Societies.

1822.
In the Matter
of a
FRIENDLY
SOCIETY.

The *Vice-Chancellor* considered, that the true intention of the last Act must have been to enable the Court to make such Orders upon Petition in matters of Charity and Friendly Societies, though there was some obscurity in the expression.

Order made as prayed for in the Petition.

ANGELL v. ANGELL.

1822.
13th, 20th, and
26th November.

THIS Case was heard on Demurrer to the Bill, which prayed for a Commission to examine Witnesses abroad, and to perpetuate their Testimony.

Pleading.

A Demurrer will hold to a Bill to perpetuate Testimony, if it do not state that no Action can be immediately brought.

A Bill for a Commission to examine Witnesses Abroad, must allege that an Action has been brought.

Prima facie, Discovery is incidental to Relief.

The Bill stated, that *John Angell*, by his Will, dated 21 September 1774, executed so as to pass Freehold Estates; gave and devised to the *Heirs Male, if any such there were, of William Angell, the first Purchaser, at Crowhurst, and Father of his Great Grandfather, John Angell, Esquire, and their Male Heirs for ever*, all his Lands and Estates, both Real and Personal, in *Surrey, Kent and Sussex*, nevertheless, subject and liable to such Conditions as should be thereafter mentioned, and should not be otherwise disposed of and given; and if there should be no male Heirs or Descendants of the same *William*, or the first *Angell*, of *Northamptonshire*, in order as they should be found or made

1822.

ANGELL

v.

ANGELL.

apparent; and if there should be none of those in being, or that should be apparent, and plainly and legally make themselves out to be *Angells*, and so related and descended, he then gave all his Estates whatsoever, both Real and Personal, to *William Browne*, Esquire, Grandson to Mrs. *Frances*, the Wife of *Benedict Browne*, Esquire, who was an *Angell*, and his Male Heirs for ever.

The Bill then stated, that there were many Persons resident in *England* of the name of *Angell*, and that several of them had endeavoured to establish a Claim under the Devise to *the Heirs Male of William Angell, the first Purchaser, at Crowhurst*, or to *the Male Heirs of the first Angell, of Northamptonshire*, but that all of them had failed to produce satisfactory evidence in support of their Claim; and that in fact, there were no Male Heirs now in existence of the body of the said *William Angell*, the first Purchaser, at *Crowhurst*, but that the Plaintiff was the Male Heir of *William Angell*, of *Crowhurst*, by collateral Descent, in manner therein-after mentioned. The Bill then traced the Descent of the Plaintiff from the only Brother of *William Angell*, the first Purchaser, at *Crowhurst*.

It also stated, that, sometime after the death of the Testator, a Person of the name of *Benedict Browne* entered upon the Estates, and took Possession of them, assuming to be entitled under the Devise to *William Browne* and his Male Heirs; and that this Person, in order to strengthen his pretended Title, had taken upon himself the additional surname of *Angell*, and exercised various acts of Ownership, by selling and letting divers parts of the Real Estates; and that a part of the Real Estates of considerable value was now in the Possession

1822.

ANGELL
v.
ANGELL

of this Person, as the ostensible Owner and Proprietor thereof, or of his Under-tenants; but that the Plaintiff had as yet been unable to trace, with any certainty, who were in Possession of other parts of the Estates, so as to name them as Defendants to this Bill.

The Bill stated also, that the Plaintiff had, ever since the Testator's death, resided in America, until within the Two last years, during which time he had twice come over to *England*, in order to investigate his Right, and assert his Claim to the Estates in question; and that it was not till within these Two years that he had been made acquainted with the Provisions of the Will of *John Angell*, or with the Fact, that he was the Heir Male of *William Angell* the first Purchaser at *Crowhurst*.

It then stated, that the Plaintiff was *about to commence* an Action at Law to recover Possession of the Estates, of which the Defendant was so in Possession; and that in such Action it would be necessary for him to prove, amongst other things, the several Facts before mentioned, relating to his Descent; and that the same could be proved by divers other Persons now resident in America, and out of the jurisdiction of the Court, but that such Persons were very aged; and likely to die before the Plaintiff could bring his Action to trial, and that he would lose the benefit of their Testimony at such Trial, unless their Evidence was perpetuated in this Court.

The Bill prayed; that the Plaintiff might be at liberty to examine his Witnesses, and that their Testimony might be preserved and perpetuated; and that a Commission might be granted for the examination of his

1822.

ANGELL
v.
ANGELL.

Witnesses in the United States of America, and other Parts beyond the Seas, *and for general Relief.*

To this Bill the Defendant demurred, on two grounds ; First, for want of Equity generally : Secondly, because the Plaintiff had not annexed to his Bill an Affidavit of any of the circumstances, by means of which the Testimony of the Witnesses, whom he prayed he might examine in order to perpetuate their Evidence, was in danger of being lost (a).

The Court called upon Mr. *Pemberton*, the Counsel for the Plaintiff, to produce some authority in support of such a Bill as this, which sought to perpetuate the Testimony of Witnesses where no Action at Law had been brought, and nothing was averred in the Bill to show that an Action could not be brought immediately. No such Authority could be produced at this time, and the Case was therefore allowed to stand over for a week.

20th November.

Mr. *Pemberton*, for the Bill.

This Bill prays for a Commission to examine Witnesses abroad, and is in fact a Bill for a Commission, and for a Discovery. It must be considered to be a Bill for Discovery, because it contains Interrogatories as to how the Defendant is entitled to the Lands in question. It is clear from the Authorities, that a Bill for Discovery will lie before an Action at Law is brought. There has indeed been a difference in the Practice on this point; but the latest Authorities are in favour of the doctrine, that there may be a Bill for Discovery before an Action is brought. This could not be considered as

(a) See Mitf. 41. & 12

a Bill for relief, merely because it prays for a Commission to examine Witnesses. *Moodalay v. Morton* (b) is an express Decision, that a Demurrer will not hold to a Bill for a Commission to examine Witnesses, because no Action has been brought. *Mendes v. Barnard* (c) is another authority to the same effect; and another Case, *Emmot v. Aylet*, is mentioned by Sir Lloyd Kenyon, in his Judgment in *Moodalay v. Morton*. It is said by Lord Eldon, in *The City of London v. Levy* (d), that "Where the Bill avers that an Action is brought, or where the necessary effect in Law of the Case stated by the Bill, appears to be, that the Plaintiff has a right to bring an Action, he has a right to a Discovery to aid that Action so alleged to be brought, or which he appears to have a right and intention to bring." The same reasoning which applies to the case of a Bill for Discovery, must apply also to a Bill for a Commission to examine Witnesses, because they are Bills of the same nature; and in both cases the Costs must be paid by the Plaintiff (e). It might be said, that, if the Bill for a Commission was brought before Action, the Plaintiff might never bring his Action; but the same thing might be said of a Bill for Discovery. The Demurrer, even if good as to the other parts of this Bill, does not extend to the Discovery which is sought by it.

1822.
13th November.

ANGELL
v.
ANGELL.

Mr. Bell, and Mr. Ellison, for the Demurrer, relied on the general rule, that a Bill of this nature could not be sustained before Action; and contended that *Moodalay v. Morton*, and the other cases cited, were cases of exception on account of particular circumstances; and they cited the case of *Pitt v. Short*, before Lord

(b) 2 Dick. 652; 1 Bro. C. C. 469.

(c) 1 Dick. 65.

(d) 8 Ves. 404.

(e) Mitf. 120.

1822.

ANGELL

v.

ANGELL.

Eldon, Trin. 1810, in which it was decided, that a Demurrer would hold to a Bill for a Commission to examine Witnesses, in aid of an Action, if the Bill did not state that an Action had actually been brought (*f*). As to the Demurrer for want of an Affidavit, it was laid down expressly by Lord *Redesdale* (*g*), that the want of an Affidavit to a Bill of this kind is good cause of Demurrer. This was plainly a Bill for Relief, and not a mere Bill for Discovery.

The VICE-CHANCELLOR:—

26th November. When this Case was opened, it appeared to me that there were other objections to the Bill than those which had been suggested, and which might be taken advantage of under the general Demurrer; namely, that, if considered as a Bill to perpetuate Testimony, it was defective, because it did not allege that the matter in question could not be made the subject of an immediate Action; and that if it could be considered as a Bill to examine Witnesses abroad in aid of an Action at Law; it was defective, because it did not allege that an Action was then pending. And I directed the Case to stand over for a week, in order to have those points considered.

Upon the second Argument, the Counsel for the Plaintiff produced the case of *Moodalay v. Merton*, as an authority for the Proposition, that this Court would entertain a Bill for a Commission to examine Witnesses abroad in aid of a Trial at Law, although no Action at Law was then pending.

(*f*) This Case is not reported, but was cited from a MS. Note of Mr. *Newland*'s.

(*g*) Mitf. 41. & 121.

The jurisdiction which Courts of Equity exercise to perpetuate Testimony, is open to great objections: First, it leads to a Trial on written Depositions, which is much less favourable to the cause of truth than the *vivâ voce* examination of Witnesses. But what is still more important, inasmuch as those written Depositions can never be used until after the death of the Witnesses, and are not indeed published till after the death of the Witnesses, it follows, whatever Perjury may have been committed in those Depositions, it must necessarily go unpunished. And this Testimony has, therefore, this infirmity, that it is not given under the sanction of the Penalties which the general policy of the Law imposes upon the crime of Perjury. It is, for these reasons, that Courts of Equity do not entertain Bills to perpetuate Testimony generally for the purpose of being used upon a future occasion, unless where it is absolutely necessary to prevent a failure of Justice.

1822.

ANGELL
v.
ANGELL.

Objections to the Jurisdiction of Courts of Equity to perpetuate Testimony.

12. 29. Jan. 274

If it be possible that the matter in question can, by the Party who files the Bill, be made the subject of immediate judicial investigation, no such Suit is entertained. But if the Party who files the Bill can, by no means, bring the matter in question into present judicial investigation (which may happen when his Title is in Remainder, or when he is himself in Possession) there, Courts of Equity will entertain such a Suit: for, otherwise, the only Testimony which could support the Plaintiff's Title, might be lost by the deaths of his Witnesses. Where he is himself in Possession, the adverse Party might purposely delay his Claim with a view to that event. It is, therefore, ground of Demurrer to a Bill to perpetuate Testimony, generally, that it is not alleged by the Plaintiff that the matter in question cannot be made

Cases in which this jurisdiction is exercised.

1822.

ANGELL
v.
ANGELL.

by him the subject of present judicial investigation. But Courts of Equity do not merely entertain a Jurisdiction to take or preserve Testimony, generally, to be used on a future occasion, where no present Action can be brought, but also, to take and preserve Testimony, in special Cases, in aid of a Trial at Law, where the subject admits of present investigation. At Law, no Commission to examine Witnesses who are abroad, for the purpose of being used at the Trial, can go without the consent of the adverse Party. Courts of Equity will, upon a Bill filed, grant such Commission without the consent of the adverse Party. So Courts of Equity will entertain a Bill to preserve the Testimony of aged and infirm Witnesses to be used at the Trial at Law, if they are likely to die before the time of Trial can arrive; and will even entertain such a Bill to preserve the Testimony of a Witness who is neither aged nor infirm, if he happen to be the single Witness to support the case.

I have already observed, that the case of *Moodalay v. Morton* has been cited on the present occasion as an authority that Courts of Equity will entertain a Bill for a Commission to examine Witnesses abroad in aid of a Trial at Law, where a present Action may be brought, and is not brought. When that case comes to be accurately examined, it will be found not to sustain, nor even to favour, such a general proposition. The object of the Bill there, was, to discover, by the examination of Witnesses in the East Indies, whether the Persons who had done the act complained of, had or not the authority of the East India Company, for the purpose of determining whether redress was to be sought against the East India Company, or the Person who had done the act individually. The cases cited principally apply to this view of the case; and the learned

Judge proceeds upon it. If a Bill will lie for the purpose of ascertaining facts upon which it must depend against whom the Action is to be brought, such a Bill must necessarily precede the Action ; and this case being a case of specialty and exception, rather disproves than affirms the general propositions for which it was cited.

1822.

ANGELL
v.
ANGELL.

If a Bill for a Commission to examine Witnesses abroad to be used on a Trial at Law, were entertained before any Action actually commenced, then, inasmuch as it is not pretended that there is any time limited within which the future Action is to be brought, this consequence might follow ; that the Plaintiff in the Bill, having obtained this written Testimony, not given under the sanction of the Penalties of Perjury, might delay his Action until after the deaths of those Witnesses for the adverse Party resident in this country and subject to *viva voce* examination, whose Evidence might be in opposition to this written Testimony ; and thus the justice of the case might be defeated. On the other hand, no reason of justice, or even of convenience to the party Plaintiff in such a Bill, requires that he should be permitted to file it before he has actually commenced his Action. The necessary effect of such a Bill is, to suspend the Trial until the Commission is returned, and to secure to him the benefit of his foreign Evidence ; and all further delay of Trial is injustice to the other Party.

I am therefore of opinion, both upon authority and upon principle, that a Bill for a Commission to examine Witnesses abroad in aid of a Trial at Law, where a present Action may be brought, is demurrable to if it do not aver that an Action is pending.

1822.

ANGELL
v.
ANGELL.

The present Bill alleges, that the Witnesses in America whom the Plaintiff purposes to examine in support of the Action, which he avers he intends to bring, are aged and infirm, and likely to die before the Plaintiff may be able to bring the said intended Action to a Trial. I have stated, that Courts of Equity will entertain Bills to preserve the Testimony of such Witnesses, in order to prevent the failure of justice by their deaths before Trial, even where the subject admits of present judicial investigation. In the Case of *Phillips v. Carew (h)*, it seems to have been held by the *Master of the Rolls*, and also by the *Lord Chancellor* upon a re-hearing, that such a Bill would lie before an Action actually commenced, provided the Plaintiff annexed to his Bill an Affidavit of the truth of his alleged statement with respect to the Witnesses. If that Case be to be followed as an authority, it would not assist the present Plaintiff, for he has annexed no such Affidavit to his Bill; and the want of the Affidavit is assigned here as a special cause of Demurrer.

The principle of that Case (supposing it to be correctly reported), is not, however, very satisfactory. Written Depositions, on account of the infirmity which I have before referred to, are never to be received where with reasonable diligence, *vivâ voce* testimony may be had, and the circumstance that the Witnesses are aged and infirm, should be rather a reason for the Action being immediately brought, to give the better chance of their living till the Trial, than a reason for permitting the Action to be indefinitely delayed at the pleasure of the Plaintiff. Whenever such a Case

occurs again, the principle of *Phillips v. Carew*, will come to be reconsidered (i).

1822.

ANGELL
v.
ANGELL.

On the part of the Plaintiff, it is however argued, that if the Demurrer could otherwise be supported, it must fail, because it extends to the Discovery as well as to the Relief, and that if the Plaintiff be not entitled for the reason stated, to perpetuate Testimony, or to examine his Witnesses abroad, yet still he is entitled to a Discovery.

I am not of that opinion. *Primâ facie*, it must be intended that the Discovery is incidental to the Relief. This Plaintiff might perhaps have used expressions, which would have made the Discovery a substantive part of his Case. It is sufficient to say, that he has used no such expressions in this Bill; and that the Discovery is only sought for by the common form of Interrogatory.

Demurrer allowed.

(i) See as Bills to perpetuate testimony, and for Commissions to examine Witnesses abroad, the following Cases: *Duke of Dorset v. Girdler*, Pr. Cha. 531; *Pawlett v. Ingray*, 1 Vern. 308; *Gill v. Hayward*, 1 Vern. 312; *Bechinall v. Arnold*, 1 Vern. 354; *Parry v. Rogers*, 1 Vern. 441; *Morse v. Buckworth*, 2 Vern. 440; *Wynne v. Hally*, Pre. Cha. 531; *Cressett v. Mitton*, 3 Bro. 481; *Shirley v. Ferrars*, 3 P. W. 77; *Brandlyn v. Ord*, 1 Atk. 571; *Earl of Suffolk v. Green*, 1 Atk. 450; and *Lord Dursley v. Fitzharding*, 6 Ves. 251; in which last Case the various authorities were fully discussed.

1822.
28th November.

VERLANDER v. CODD.

Practice.—Mistake.

If, in the Title of an Order to dismiss a Bill for want of Prosecution, the Plaintiff is called by a wrong Christian Name a Replication filed after the Order is drawn up and served, will not be taken off the file.

ON the 27th of July last, the Defendant obtained an Order to dismiss the Bill in this Cause for want of Prosecution.

The Plaintiff's name was *Jacob Alexander Verlander*; but, in the Title of the Order, he was called, by mistake, *Daniel Verlander*. The Order, so drawn up, was duly served upon the Plaintiff's Clerk in Court on the 22d day of August last.

On the 29th of October last, the Plaintiff filed a Replication.

Mr. *Bligh*, for the Defendant, moved to take the Replication off the file, for irregularity. He contended that no service of the Order was necessary, but that it operated from the time it was pronounced; and he cited *Lorimer v. Lorimer (a)*.

The VICE-CHANCELLOR:—

What is decided in *Lorimer v. Lorimer* is, that when you draw up the Order, it acts retrospectively from the time it was made. The Bill is not out of Court until you draw up the Order; and, when it is drawn up, it acts retrospectively from the time it was made. This is an Order dismissing the Bill of *Daniel Verlander*; whereas there is no such Cause in Court.

Motion refused.

(a) 1 Jac. & Walk. 284.

See 19. Jur. 272.

WAKE v. FRANKLIN.

1822.
28th November.

THIS Suit was instituted for a Discovery and for a Commission to examine Witnesses abroad, in aid of an Action at Law. *Practice.—Return of Commission.*

A Commission dated the 24th of August 1821, was accordingly issued for the examination of Witnesses at Hamburgh, and was made returnable without delay: but it appeared that it was not executed until after the end of Michaelmas Term 1821.

Commissions for the Examination of Witnesses abroad, returnable without delay, need not be returned within the same period as Home Commissions, viz. before the end of the Term next after they are issued; but a reasonable time is allowed, according to circumstances.

Mr. *Wray* moved, on a former day, that the Depositions taken by virtue of this Commission might be suppressed, on the ground that the Commission being dated in August 1821, and made returnable without delay, ought, according to the practice of the Court, to have been returned on or before the last day of Michaelmas Term 1821. *Barnsley v. Powell (a).*

It was admitted by the other side, that this would have been the case, if the Commission had been a Home Commission; but it was contended, that the same rule did not apply where the Commission was a foreign one. The *Vice-Chancellor*, ordered the Motion to stand over that the practice might be inquired into.

It was found, upon inquiry, that there was no settled rule as to the time at which a Foreign Commission, returnable without delay, ought to be returned.

Mr. *Wray*, this day, repeated his Motion, and said, that it was clear, in all Cases where a Commission issued for the examination of Witnesses in England, returnable

1822.

WAKE
v.
FRANKLIN.

without delay, that it must be returned before the end of the next Term ; but that he was not able to find any Cases as to a Commission to be executed abroad : That it was proper for the Party to apply, that the Commission might be returned in a reasonable time ; but that, if it was made returnable without delay, it must have the same construction as a Commission to be executed in England : And that, as it appeared that this Commission was executed after the time when it ought to have been returned, the power of the Commissioners was determined ; and the Depositions taken by them ought, therefore, to be suppressed.

Mr. Rose, contra :—

It was found that there was no rule governing the practice as to the return of Commissions to be executed abroad, returnable without delay. The words “ without delay ” give any reasonable time. Here we have an Affidavit stating, that some of the Witnesses resided in Norway ; that the Ship, on board of which the Commission and Depositions were put for the purpose of being conveyed to England, was wrecked on the coast of Jutland : that the Captain, to whose care they were entrusted, was detained there several months, in order to re-ship to this country such part of the cargo as had been saved from the wreck : and that, immediately on his arrival in London, he delivered the Commission and Depositions to the Plaintiff’s Clerk in Court.

Here the Commission issued in the vacation ; and it would have been impossible to have returned it in the next Term.

The VICE-CHANCELLOR :—

I think it is the habit of this Court to issue Commissions returnable either on a day certain, or without delay.

In Practice, however, it is found convenient to limit the time for the return of Commissions returnable without delay. The general rule is, that such Commissions must be returned before the third return of the following Term. But this Court does not appear to have fixed any certain time within which Commissions to be executed in a foreign country are to be returnable. I am bound, therefore, until a rule is furnished by practice, to inquire whether there has been unreasonable delay. Now it appears, from the statement of Mr. *Rose*, that there has not been unreasonable delay: and I must, therefore, refuse this Motion. It is impossible to fix any certain time for the return of all Commissions to be executed abroad, on account of the different distances of the places at which they are to be executed. But it would be a good rule to fix a period for the return of every Foreign Commission, calculated on the distance of the place at which it is to be executed.

1822.
WAKE
v.
FRANKLIN.

*Some allowance
should be made
for accident. G.F.*

SAYERS v. WALOND and others.

1822.
28th November.

THIS Suit was compromised; and the Defendants having afterwards changed their Solicitor, their present Solicitor undertook to pay the former his Bill of Costs, upon its being taxed in the usual manner.

The Court has no jurisdiction to order a Solicitor's Bill to be taxed, on the application of the Solicitor himself.

A Motion was accordingly made by Mr. *Newland*, on the 7th of November, on the part of the late Solicitor, that the Bill might be referred to the *Master* for taxation; and he cited Harr. Ch. P. 360, *Newland's* Edition.

The Vice-Chancellor having expressed doubts as to
VOL. I. H

1822.

SAYERS

v.

WALOND
and others.

his power to make such an Order, upon the application of the Solicitor, ordered the Motion to stand over, that Mr. *Newland* might search for authorities. The Motion was mentioned again on the 8th of November, but the *Vice-Chancellor* still doubted as to his power of making the Order, and desired that the Motion might be mentioned again.

Mr. *Newland*, this day, renewed his application ; and stated, that he had not been able to find any authority, or any decision, except the passage he had cited from Harr. Ch. P.

THE VICE-CHANCELLOR :

I cannot make any Order. The opinion of the *Register* is, that no such Order has ever been made. Taxation is for the benefit of the Client. The Solicitor has a right to bring an Action, complying with the requisites of the statute (a).

1822.
5th December.

KEENE v. PRICE.

The Examination of a Sequestrator in the Master's Office, does not require the Signature of Counsel.

ON the 1st of November, Mr. *Agar* moved, on the part of the Defendant, Mr. *A. Riley*, that the Answer and Examination of *J. Bowyer* and *T. Charkon*, Sequestrators, in this Cause, sworn the 5th day of August 1822, to Interrogatories exhibited by the Defendant, Mr. *A. Riley*, for their Examination before the Master, might be suppressed for irregularity, because it was not signed by Counsel.

Mr. *Parker* opposed the Motion, and contended, that the Signature of Counsel was not necessary to the

(a) 2 Geo. 2. c. 23. See Beames on Costs, in Eq. 292, 293.

Examination of these persons, as they were Sequestrators, and not Parties to the Cause.

1822.

KEENE
v.
PRICE.

The *Vice-Chancellor* ordered the Motion to stand over till the first day of Term, in order that the practice might be inquired into.

On the first day of Term, Mr. *Agar* renewed the Motion, and mentioned several Cases which had been found, upon inquiry in the *Masters' Offices*, in which the Examinations of Receivers and Sequestrators were signed by Counsel; but he admitted, that there were some instances in which such Examinations were not signed.

Mr. *Parker* said, that he had looked through all the Orders, and that there was not one that required such an Examination to be signed by Counsel; and he cited *Bonus v. Flack* (a).

The *Vice-Chancellor* having directed the Motion to stand over till this day, now ruled, that the Signature of Counsel was not necessary in this Case; and added, that, though the policy of the Court made it necessary that Plaintiffs and Defendants should employ Counsel to sign the Pleadings, that rule had never been extended to Officers of the Court, not Parties to the Suit, or to other Persons, not Parties, incidentally brought before the Court.

Motion refused.

(a) 18 Ves. 287.

1822.

28th November.

BARLEE v. BARLEE and others.

*Feme Covert.
Prochein Amy.*

A married Woman being the Plaintiff, and her *Prochein Amy* having died, it was ordered, that she should name a new *Prochein Amy* within two months, or that the Bill should be dismissed, and the Costs paid out of the Fund in Court.

The separate Property of a married Woman, in the hands of the Court, is liable to the Costs of a Suit instituted by her touching that Property.

THE Bill in this Case was filed by a married Woman, suing by her next Friend, against her Husband, and the Trustees of her Marriage Settlement, for an Account of the Rents of certain Lands which had been settled to her separate use.

A sum of money, which had arisen from the Rents, had, in the course of the Cause, been paid into Court.

The next Friend having died, Mr. *Cooper* moved, that the Plaintiff might be ordered to appoint a new next Friend within a month, or that the Bill might be dismissed, with Costs, to be taxed and paid out of the Fund in Court.

Mr. *Beames*, for the Plaintiff, said, that the proper course was, to move that a new next Friend might be appointed; and that the second part of the Motion was quite irregular.

The *Vice-Chancellor* ordered, that the Bill should be dismissed, unless a new next Friend were named within two months; that the Costs of the Trustees should be taxed as between Solicitor and Client, and paid out of the Fund in Court; and that the residue of that Fund should be paid over to the Plaintiff (a). The Husband did not ask for his Costs.

(a) See *Roundell v. Currer*, 6 Ves. jun. 250; and as to the appointment of a new *prochein amy* on the death of the first, see *Bracey v. Sandiford*, 3 Madd. 468.

DAVENPORT v. DAVENPORT.

1822.
28th November.

IN this Case the Plaintiff was an Infant suing by his next Friend.

Prochein Amy.

Mr. Fisher, on behalf of the Plaintiff, moved, that a new next Friend might be substituted, on an Affidavit, that the present *Prochein Amy* was a material Witness for the Infant, and must be examined in the Cause.

Where a new next Friend is to be substituted, the Court refused to inquire into the circumstances of the proposed next Friend, though it was suggested, that he was in indigent circumstances.

Mr. Bell, on the part of the Defendant, required, that the *Prochein Amy*, who was retiring, should give Security for the Costs already incurred; and stated, that the Person who it was proposed to appoint as the new next Friend, was in indigent circumstances. He, therefore asked, that it might be referred to the Master, to enquire whether the proposed next Friend was a proper Person to act in that capacity, with a view to his circumstances.

The *Vice-Chancellor* ordered the proposed next Friend to be substituted in the room of the present one, on the latter giving Security to the Defendant for the Costs already incurred. And his *Honor* refused to enter into any inquiry as to the circumstances of the proposed next Friend, who, he said, would be at liberty to file a new Bill without such inquiry (a).

(a) See *Witts v. Campbell*, 12 Ves. 493. It is said in the *Prac. Reg.* edit. Wyatt. 349, that where a suit was by *prochein amy* not sufficient to answer the Costs, the Court ordered that another should be named. In other books it is stated that the *prochein amy* must be a *responsible* person. Mitf. 21. Stra. 708; and see *Anon.* 1 Atk. 570, where it is said that a *prochein amy* need not be a relation, but must be a *person of substance*, on account of Costs.

1822.

9th December.

WHITEHOUSE v. HICKMAN.

To prevent either an Attachment, or an Injunction, or a Motion to extend the common Injunction to stay Trial, the Answer must be filed on the evening before the Seal day at the latest.

An Answer filed on the Seal day is too late to prevent a Motion to extend the common Injunction, although the Motion, on account of the pressure of business, was not made until the following day.

THE common Injunction having been obtained in this Cause, Mr. *Wakefield*, on the 6th of December, moved to extend it to stay Trial, upon the usual Affidavit.

The Seal day was on the 5th of December, and notice of the Motion was given for that day; but, there not being sufficient time for all the Motions to be made, they were continued on the day following.

Mr. *Beames*, for the Defendant, said, that the Answer had been filed on the 5th of December; and he cited *Bishton v. Birch* (a).

Mr. *Wakefield*, replied, that the Answer having been filed on the Seal day, was filed too late to prevent the Motion being granted; and he cited *Nelthorpe v. Law* (b).

The *Vice-Chancellor* thought, that, according to the practice of the Court, this Answer had been filed too late, and referred to the *Register*.

The *Register* said, that he thought there was a decision by the *Lord Chancellor* to the contrary. His Honour therefore requested the *Register* to mention the subject to the *Lord Chancellor*.

The *Vice-Chancellor* this day said, that the Question had been mentioned to the *Lord Chancellor*, and that his Lordship was of opinion, that an Answer, for the purpose of being good cause against the granting of

(a) 2 V. & B. 40.

(b) 13 Ves. jun. 323.

such a Motion as the present, or of a Motion for an Attachment and Injunction, must be filed at the latest by eight o'clock on the evening before the Seal day (c).

1822.
WHITEHOUSE
v.
HICKMAN.

(c) The principle of the Court seems to be, that, as the Order for an Injunction, or to extend an Injunction, or for an Attachment, is to be considered as made at the very earliest moment of the Seal Day, the Answer, in order to be used as an objection to the issuing of these Orders, must be filed on the preceding day. *Bruce v. Webb*, 2 Meriv. 474. That rule is confirmed by the following case:—

IBBOTTSON v. BOOTH.

The Bill prayed for an Injunction to restrain Proceedings at Law.

The Defendant's time to answer expired on the 31st January 1823.—Early on the morning of that day, his Solicitor sent his Clerk to the Six Clerks' Office, to inquire what was the latest hour at which the office would be open, and was informed by one of the officers, that the hours for business were from ten till two, and from six till eight in the evening; but was not told that the 31st January was a half-holiday, and that the office would therefore be closed on the afternoon of that day. In consequence of this information, the Solicitor made arrangements to have the Answer sworn within the usual office hours that evening. Before three o'clock he discovered the mistake, but was informed at the Six Clerks' Office, by the Person who acted as Agent both for his Clerk in Court and for the Clerk in Court of the Plaintiff, that he might get the Answer sworn that evening at the Public Office in Southampton Buildings, and that he (the Agent) would call for it early the next morning, and put it on the file as soon as the Six Clerks' Office was open, which, he assured the Solicitor, would have the same effect as if the Answer had been filed that evening, and would prevent the Injunction.

The Answer was accordingly sworn at the Public Office, and was taken from thence by the Agent very early on the following morning, and put upon the file. The Plaintiff, however, obtained an Attachment and the common Injunction, for want of the Answer. A Motion was this day made, on behalf of the Plaintiff, that the Order for the common Injunction and the Attachment might be discharged, and that the Answer, under the circumstances, might be considered as filed on the 31st of January. The Motion was supported by an Affidavit of the Facts already mentioned.

Mr. Bell and Mr. Knight for the Motion, relied on the particular circumstances of the Case, as making it an exception to the general rule. The mistake as to the office hours was in-

1823.
5th February.
A mistake as to the office hours, (even where the Answer was sworn the day before, and was filed at the earliest possible moment on the Seal day) is no ground of exception to the general rule, that, in order to prevent an Attachment, or an Injunction, the Answer must be filed the day before the Seal day.

1822.
20th December.

Exceptions were afterwards taken to the Defendant's Answer, and some of them were allowed by the *Master* (d).

WHITEHOUSE

v.

HICKMAN.

The *Vice-Chancellor* has no Jurisdiction under the Act 53 Geo. 3. c. 24, to alter vary or discharge any Order made by the *Master of the Rolls*.

On the 16th December, the Plaintiff, by Petition to the *Master of the Rolls*, obtained the common Order, that he might be at liberty to amend his Bill, and that the Defendant might answer the Exceptions and Amendments at the same time.—On the same day, the Defendant gave notice of a Motion to be made on the 18th of December, before the *Vice-Chancellor*, that the Plaintiff might amend within ten days, or otherwise, that the Order made by the *Master of the Rolls*, might be discharged.

Mr. *Beames* now moved, pursuant to this Notice, but suggested a doubt, whether, under the Act of Parliament, 53 Geo. 3, c. 24, the *Vice-Chancellor* was authorized to discharge any Order made at the *Rolls*.

Mr. *Wakefield*, for the Plaintiff.

The *Vice-Chancellor*, in consequence of the doubt suggested as to the Jurisdiction, requested that the Motion might be made before the *Lord Chancellor*.

(d) What follows of this Case is given *ex relatione*, Mr. *Beames*,

duced by what passed with the Person who acted as Agent for both Parties.

Mr. *Duckworth*, for the Plaintiff, said, that the Person who had acted as mutual Agent, denied that he had used such expressions as were imputed to him in the Affidavit for the Defendant. *Bruce v. Webb* (a) has settled the strict rule, that, where the Attachment issues on the same day on which the Answer is filed, the former has the priority, without regard to hours.

The *Vice-Chancellor* refused the Motion, with Costs,

The Motion was accordingly made before the *Lord Chancellor*, and the doubt which had occurred as to the Jurisdiction was mentioned. His Lordship held, that the Act of Parliament gave no authority to the *Vice-Chancellor* to alter, vary, or discharge, any Order made by the *Master of the Rolls*; but his Lordship made the Order, holding, that such a Motion may be made immediately after the Order to amend is obtained, and before the Plaintiff is in delay. The Plaintiff's Counsel asking for longer time to amend than ten days, an Order was made, that he should amend before the next Seal.

immediately move that the Amendments be made within ten days, or the Order be discharged.

1822.

WHITEHOUSE
v.

HICKMAN,

Plaintiff having obtained an Order to amend, and that Defendant may answer Exceptions and Amendments at the same time, the Defendant may

COURT v. JEFFERY and others.

THE Plaintiff, by his Bill, prayed that the Defendants might be decreed to pay over to him the Sum of 550*l.* and Interest, as to which a Testamentary Appointment, in favour of various persons, had been executed by *Mrs. Alice Short*, a Feme Covert, by virtue of a Power reserved to her in her Marriage Settlement. The Appointees were not made Parties to the Suit. The Plaintiff was Administrator with the Will annexed; and prayed for an account of this Sum, in his capacity of Personal Representative of *Mrs. Short*. The Defendants were the Trustees of the Money under the Settlement by which the Power of Appointment was created.

1822.
26th November.

Parties.

The general rule is, that Appointees under the Will of a Feme Covert, are necessary Parties to a Suit, concerning the Fund which is the subject of Appointment(a).

The Cause now came on to be heard.

Mr. Bell, and *Mr. Beames*, for the Defendants, objected that the Appointees were not made Parties.

(a) See the next Case as to an exception to this Rule.

1822.

COURT
v.JEFFERY
and others.

Mr. *G. Wilson*, for the Plaintiff, said the objection was not stated in the Answer, and that it now came too late, because the Defendants, in their Answer, submitted to account.

The VICE-CHANCELLOR:—

In ordinary cases the Executor represents the whole Personal Estate, and no Legatee need be a Party. The Personal Estate may be exhausted by the Debts, and the interest of the Legatee is therefore uncertain. But the Appointees under the Will of a Feme Covert are in a different situation; their interest cannot be defeated by Debts; and they are in the common situation of *Cestuis que Trust*, and must be made Parties.

The Cause was ordered to stand over, with leave to the Plaintiff to amend. The Defendants did not get their Costs, because the objection was not taken by the Answer.

1822.

15th December.

MANNING v. THESIGER and others.

Parties.

Where Appointees are very numerous, and the Bill is filed by some of them, on behalf of themselves and the others, the Court will dispense with the general rule, which requires all Appointees to be Parties.

THE Plaintiffs sued on behalf of themselves and the other Legatees and Appointees under the Will of *Mary Welsford*, a married Woman, deceased; and the Bill prayed, that the Fund, which was the subject of the Appointment, might be transferred into the name of the Accountant-General, on the ground that *Thesiger*, one of the Trustees of the Fund, was desirous to be discharged; but refused to transfer the Fund into the name of a new Trustee without the authority of the

Court, alleging that the Appointees differed among themselves as to the choice of a Person to be appointed Trustee in his room.

1822.

MANNING
 v.
THESIGER
 and others.

Mr. *Keene*, for the Plaintiffs, moved that *Thesiger* be ordered to transfer the Fund into the name of the Accountant-General, in trust in the Cause.

Mr. *Garratt*, for the Defendants, objected that all the Appointees of Mrs. *Welford* were not Parties to the Suit.

Mr. *Keene* replied, that the Appointees were more than fifty in number, and that it would therefore be very inconvenient to bring them all before the Court; and that the Bill was filed by the Plaintiffs on behalf of themselves and the other Appointees.

The *Vice-Chancellor* said, that, as the Appointees were *Cestuis que Trust*, they ought regularly to be all made Parties to the Suit; but that, as they were very numerous, and as the Bill was filed by the Plaintiffs on behalf of themselves and the other Appointees, the rule might in this case be dispensed with (a).

(a) In *Croker v. Parrott*, 2 Cha. Ca. 228, on a Bill, by one of several Children, who were Appointees of their Mother, to set aside the Appointment, on account of the unfairness of the distribution; it was held, that all the other Children who were Appointees, need not be Parties, because they might go in before the Master,

1822.

20th November.

10th, 11th, &

17th December.

DEW v. CLARKE.

THIS Case was heard on Demurrer.

Multifariousness.

Two distinct Matters cannot be joined in the same Suit, where one requires that the Depositions should not be published till the hearing of the Cause, and the other requires an immediate Publication of the same Depositions.

Costs.

On Demurrer allowed to a Bill for a Commission to examine Witnesses, *de bene esse*, the Plaintiff having, on an *ex parte* Application, obtained an Order to examine the Witnesses, was ordered to pay to Defendants, besides the usual Costs of the Demurrer, the Costs of the Depositions; but not of those taken on Cross-examination.

The Bill was by *Dew* and his Wife, who claimed in her right as Heiress at Law and only Next of Kin, against the Devisees and Personal Representatives of her Father, *Eli Stott*; impeaching a Will obtained by the Defendants, on the ground of Incapacity in the Testator.

Eli Stott, the Testator, at the time when the Will in question was made, was seised in Fee Simple of certain Real Estates, subject to a Lease granted by him for a term of years, which would expire in the year 1826. The validity of this Lease was not questioned. The Will, which was made in May 1818, contained a Devise of all the Testator's Real and Personal Estate to the Defendants, *Fletcher*, *Reid* and *Rawlings*, upon certain Trusts; and appointed them, together with the Defendant, *Mary Stott*, to be the Executors. The Executors renounced Probate of the Will, and the Prerogative Court granted Letters of Administration, with the Will annexed, to two Persons of the name of *Clarke*, who were named in the Will as Residuary Legatees, and were also made Defendants in this Cause.

The Bill stated, that if this Will was ever executed by *Eli Stott*, that he was then of unsound mind, and incapable of disposing of his property, and that the Executors had renounced Probate of the Will, because they knew the Testator to have been of unsound mind at the time when the Will was made, and because they were unwilling to make oath that they believed this Will to be the last Will of *Eli Stott*.

After setting forth these facts, the Bill went on to state, that the Plaintiffs had instituted a Suit in the Prerogative Court to recall the Letters of Administration with the Will annexed, granted to the two *Clarks*, and to have Administration, as in a Case of total intestacy, granted to the Plaintiff, Mrs. *Dew*, as the only Next of Kin. It then stated, that pending this Suit in the Ecclesiastical Court, the Personal Estate was in danger of being lost and misapplied :—That the Executors named in the Will claimed to be entitled under it, and that one of them (*Fletcher*) had actually received the Rents of the Real Estate : That the Plaintiff had brought an Action at Law against the Defendant *Fletcher*, to recover the Rent thus received by him, and intended in that Action to dispute the validity of the Will. The circumstances of the Incapacity of the Testator were then set forth in the Bill at large, after which it stated, that several Witnesses, whose Evidence would be material to the Plaintiffs in the Action already commenced, or in any Action of Ejectment in which the validity of the Will might be disputed, were old and infirm, and that before any Trial could take place, there was great danger of their dying, or being incapable of attending at the place of Trial to give *vivá voce* Evidence; so that the Plaintiffs would lose the benefit of their Evidence and be materially injured, unless these Witnesses were examined *de bene esse*; and that even if the Plaintiffs should recover in the Action commenced against *Fletcher*, the other Defendants would not be bound by the Verdict or Judgment in that Action; and that on account of the subsisting Lease of the Real Estate, the Plaintiffs had no present means of bringing an Ejectment to try the validity of the Will against all the Defendants, who therefore meant to lie by till after the expiration of the Lease, and after the Plaintiffs should

1822

DEW
v.
CLARKE.

1822.

DEW
v.
CLARKE.

have lost divers of the Witnesses who could prove the matters aforesaid; and that the Plaintiffs were, therefore, "advised, that the Evidence of the matters aforesaid ought to be perpetuated in this Court against the Defendants."

The Bill prayed:—1st, That the Personal Estate might be secured pending the Litigation in the Ecclesiastical Court, and for this purpose that an Injunction might be granted against the Personal Representatives, and a Receiver appointed. 2d, "That the Plaintiffs might be at liberty to examine Witnesses, touching the validity of the alleged Will, and more especially touching the state of the said *Eli Stott's* mind and understanding, and the several Allegations aforesaid relating thereto, and that the Testimony of such Witnesses might be perpetuated: and (3dly,) That the Plaintiffs might be permitted to examine *de bene esse* such of them as were aged or infirm, or were the only Witnesses to any particular fact."

To this Bill the Defendants put in a general Demurrer for want of Equity, and for Multifariousness.

Mr. *Heald* and Mr. *Pepys* for the Demurrer:—

I. This is a Bill to perpetuate the Testimony of Witnesses, and also praying for Relief in other matters, as to which Publication of the Evidence must pass in the course of the Cause. It is settled, that a Bill which seeks to perpetuate Testimony, ought not to contain any prayer for Relief. *Rose v. Gannell* (a), *Berney v. Eyre* (b), *Vaughan v. Fitzgerald* (c).

(a) 3 Atk. 439.

(b) 3 Atk. 387.

(c) 1 Scho. & Lef. 317.

11. There is no Equity in this Case to have the Property preserved, pending the Suit in the Ecclesiastical Court, because Administration, with the Will annexed, has already been granted, and there is thus a legal Personal Representative. If the right to have Letters of Administration were still in dispute in the Ecclesiastical Court, and there was danger of loss or misapplication of the Personal Estate, in the meantime, for want of a legal Personal Representative, there might then be some ground for an application to this Court. But where the Ecclesiastical Court has actually appointed an Administrator, and the Suit pending there is to recall the Administration, there is no ground for the interference of the Court (d).

(d) The principle on which the Court of Chancery interferes to preserve Personal Property, pending a Litigation in the Ecclesiastical Court, is plainly applicable to Cases in which the Litigation there is to recall Probate or Administration already granted, as well as to those Cases in which no Probate or Administration has been granted, before the application to the Court of Chancery. In *Ball v. Oliver*, 2 V. & B. 96, this was expressly decided, though it is not so stated in the marginal Abstract of that Case. The doctrine is confirmed by the following more recent Case in this Court.

RUTHERFORD v. DOUGLAS.

This Bill was filed against the Executors of *Richard Hall*, by his Sister and sole Next of Kin. It prayed the usual Accounts of the Personal Estate, and for a Receiver and an Injunction, pending a Suit instituted by the Plaintiff in the Ecclesiastical Court, to recall the Probate.

The Testator, when on his death-bed, at the time when he was insensible and utterly incapable of disposing of his property, was made to affix his mark to the alleged Will by one of the Defendants, who caused a pen to be put between the Testator's fingers, and guided his hand. The Defendants obtained Probate of this Will on the same day on which the Testator was buried.

The Bill stated these facts, together with other strong circumstances, as Evidence of Incapacity in the Testator, and of the charge that the Probate had been obtained by fraud.

A Motion was made for a Receiver and an Injunction, against the Defendant, before Answer, on Affidavits of the truth of the Allegations contained in the Bill.

1822.

DEW
v.
CLARKE.

6th Dec. 1822.

RUTHERFORD
v.
DOUGLAS.
Receiver.

This Court will appoint a Receiver, pending a Suit in the Ecclesiastical Court to recall Probate, on a Case of strong Presumption.

1822.

DEW
v.
CLARKE.

III. The Bill is unquestionably multifarious. Besides seeking to preserve the Personal Property, pending Litigation in the Ecclesiastical Court, it also prays, that the Testimony of Witnesses may be perpetuated as to the right to the Real Estate, and that Witnesses may be examined *de bene esse*, in aid of an Action already brought to recover Rents and Profits. The Court, if it interferes at all against the legal right of the Personal Representative, can only do so on a Case of strong Presumption. Affidavits may be sufficient for the purpose of a Motion for a Receiver, but the Defendant may insist on the Cause being brought to a hearing, and then the Plaintiff must establish his Case by regular Evidence in the Cause. Regularly, this Evidence should not be published till the hearing of the Cause; but if used for the purpose of the Trial at Law, there must, as to such parts of it as are used for that purpose, be an immediate Publication. This inconvenience makes it impossible to join in the same Suit two distinct matters, one of which requires an immediate Publication of the

RUTHERFORD
v.
DOUGLAS.

Mr. *Horne* and Mr. *Matthews*, in support of the Motion, which was not opposed.

THE VICE-CHANCELLOR:

The ordinary application is for a Receiver, where the legal Administration has not been granted by the Ecclesiastical Court, and pending the Contest for such Administration.—Here the legal Administration has been granted by the Ecclesiastical Court, but there is a pending Contest to recall the Probate.

Taking into consideration the Evidence respecting the Incapacity of this Testator—the manner in which the Will was obtained—the sort of surprise by which the Probate was acquired, and the danger to the Property; and grounding myself on the Jurisdiction in this Court, to protect Property pending a Litigation in another Court, I am of opinion that this is a fit Case for a Receiver and an Injunction.

See also *Atkinson v. Henshaw*, 2 V. & B. 85, and the Cases there cited, together with the Cases cited in *Ball v. Oliver*, 2. V. & B. 96.

Testimony, while the other requires Publication to be postponed till the usual stage.

1822.

DEW
v.
CLARKE.

Mr. Bell, and Mr. Garratt, for the Bill:—

As to the *first* point: inasmuch as the outstanding Term in the Lessees prevents an Action of Ejectment from being brought till the Lease has expired, the Bill makes out a good Case for perpetuating Testimony.

As to the *second* point: the principle on which the Court acts, as to the preservation of Property pending Litigation in the Ecclesiastical Court, clearly applies to those Cases where the Litigation takes place for the recall of Probate or Administration, as fraudulently obtained. *Atkinson v. Henshaw* (e), and *Ball v. Oliver* (f).

As to the *third* point: the Bill is not multifarious. Where the objection to the Will applies equally to the Real and the Personal Estate; and where the same Defendants are interested as to both, it is very difficult to show how such a Bill can be multifarious. *Mif.* 146. Here there are no distinct matters, as to which relief is sought against several Defendants. All that the Court will consider in such a Case as this, is, whether the Plaintiff brings forward his Case in such a way, as that the Matters in question can be fairly and properly discussed. Even if there were two distinct Bills filed by the Plaintiff, it is plain, that, as the Validity of the Will must be the main Question to be decided in both, it would be necessary to examine the same Witnesses in both Causes; and in one Cause, Publication would pass immediately, while in the other Cause, the Testimony would be locked up for years, till an Action of Ejectment could be brought.

(e) 2 V. & B. 84.

(f) 2 V. & B. 96.

1840.

Dew
v.

CLARKE.

It is therefore quite clear, that the inconvenience which is complained of, is unavoidably incident to such a Case, and cannot be prevented by separate Suits.

The VICE-CHANCELLOR :—

It appears to me, that this Bill makes out no Case for perpetuating Testimony. Although it were true, that the Validity of the Will could not, by reason of the Lease, be immediately tried with the Devises in Trust, yet it may be immediately tried by an Action for Rent against the Tenant. Testimony can be perpetuated only where by no means the Plaintiff can presently assert his Title to the Property. I must therefore reject altogether the prayer to perpetuate Testimony, and consider the Bill as if it were not inserted, and not therefore multifarious on that account.

It has, however, been said for the Defendants, that the same objection applies to that part of the Bill, which seeks to protect the Personal Property; that, to induce the Court to interfere against the legal Title of the Executor, it is necessary to establish by Evidence, strong Presumption against the Will; and, although this would be attempted by Affidavit for the purpose of obtaining a Receiver, yet the Defendants may force on the Cause to a hearing on that point, and then it would be incumbent on the Plaintiff to establish the same Presumption against the Will by regular Testimony; that this Testimony ought not to be published, till the Cause is ripe for hearing, yet, as far as it is used at Law, it would be immediately published; and, therefore, these two purposes are inconsistent, and cannot be joined in the same Suit.

I yield to this reasoning, and shall allow the Demurrer.

It is extremely true, that if a distinct Bill were filed for examining the Witnesses in aid of the Trial at Law, that the immediate Publication would give the same information to the Parties, as if it were in the same Suit. And so too would the *vivâ voce* Examination of Witnesses at Law. But this is a consequence unavoidable in all Cases where the same Testimony is to be used at Law and in Equity. Still the rule must prevail, that you cannot join in one Suit two distinct matters, one of which requires that the Depositions taken in the Cause should not be published until the Cause is ripe for hearing, and the other requires a previous Publication of the very same Depositions, not merely the same Testimony.

1822.
DEW
v.
CLARKE.

Demurrer allowed.

His Honor offered to allow the Plaintiffs leave to amend the Bill, by confining it merely to the protection of the Property pending the Litigation; but they did not avail themselves of that offer; and the usual Order was made, allowing the Demurrer.

1822.
17th December.

In this same Case the Bill was filed on the 24th July 1822.

DEW
v.
CLARKE.
Costs.

On the 27th of the same month the Plaintiff obtained the usual Order, *ex parte*, to examine the old and infirm Witnesses *de bene esse*.

On the 30th, a Subpœna to answer was served on the Defendant.

On an *ex parte* Application, obtained an Order to examine the Witnesses, was ordered to pay to the Defendants, besides the usual Costs of the Demurrer, the Costs of the Depositions, but not of those taken on Cross-examination.

On Demurrer allowed to a Bill for a Commission to examine Witnesses *de bene esse*, the Plaintiff having,

1822.

DEW
v.
CLARKE.

On the 14th August following, the Order for Examination of the Witnesses *de bene esse*, was served on the Defendants.

On the 16th August, the Defendants filed their Demurrer.

On the 14th September following, the Witnesses were examined *de bene esse*, the Defendants joining in the Commission, and cross-examining the Witnesses.

Before the Demurrer was argued, the Plaintiffs moved for an Order that the Clerk in Court might attend at the Trial at Law, with the Depositions taken *de bene esse*, for the purpose of having them read where it appeared to the Court of Law, that the Witnesses were unable to attend (g).

When this Motion was made, it was insisted for the Defendants, that if the Demurrer was allowed, these Depositions would fall to the ground, and could not there be used in the meantime. The Court, therefore, ordered the Motion to stand over till after the Demurrer was argued.

17th December. After the Demurrer was allowed (11th December), the Defendants on 17th December (the next day for Motions), moved that the Plaintiffs, in addition to the 5*l.* the usual Costs on a Demurrer, being allowed, might pay the full Costs, including the Costs of the Depositions.

Mr. Heald, and Mr. Pepys, for the Motion, insisted

(g) See *Andrews v. Palmer*, 1 V. & B. 21. *Corbett v. Corbett*, *ibid.* 335. *Jones v. Jones*, 1 Cox, 184.

1822.

DEW
v.
CLARKE.

on the general Order by Lord *Loughborough*, dated 6th February 1794 (*h*), *Griffith v. Wood* (*i*), *Wood v. Dyneley* (*k*), and *Pilkington v. Wignall* (*l*), Cases in which, on the ground of vexatious conduct on the part of the Plaintiff, the Defendant, on having his Demurrer allowed, had full Costs. The intention of the 5 *l*. Costs was to indemnify the Party; but, in the present Case, the Plaintiff, by his *ex parte* Application, has produced the Depositions, which occasioned very heavy expense in this Cause to the Defendants.

Mr. *Bell*, and Mr. *Garratt*, for the Plaintiffs, objected that this Application came too late, as the Bill was out of Court, by the Order allowing the Demurrer; and that there was no Cause pending before the Court in which the Order now sought could be pronounced.

The *Vice-Chancellor* said, if that was any objection, it might be removed by making the Order as if at the time of arguing the Demurrer, which seemed the best mode.

His *Honor* ordered, that, besides the 5 *l*. Costs, to be paid as usual on a Demurrer being allowed, the Plaintiff should pay to the Defendant the Costs of the Depositions on the Examination in Chief, but not of those on Cross-examination.

(*h*) 4 Bro. C. C. 545. Beames's Ord. Chan. 456. Mr. Beames, with his usual industry, has collected the following Cases determined upon this Order. *Griffith v. Wood*, 1 V. & B. 307. *Griffin v. Nanson*, Reg. Lib. A. 1796, fol. 578. *Kaye v. Bradley*, *ibid*, fol. 449. Lord *Newark v. Calvert*, and Lord *Newark v. Turner*, *ibid*, fol. 523. See also *Bailey v. Tanner*, mentioned in Beames on Costs, 223. in the note.

(*i*) 1 V. & B. 307.

(*k*) 1 Madd. 32.

(*l*) 2 Madd. 240. & 328.

1822.
10th & 17th
December.

Practice.

—
An Attachment for want of an Answer to an amended Bill cannot be obtained until the Amendments have been entered in the Six Clerk's Book, and it makes no difference whether the original Bill has or has not been answered.

ADAMSON v. BLACKSTOCK and others.

IT was moved, on behalf of *Greaves*, one of the Defendants, that an Attachment which had issued against him for want of an Answer to the amended Bill, might be discharged, with Costs, for irregularity.

It appeared, that, in July last, when this Cause came on to be heard, it was objected that the Bill was a Bill of Revivor merely; whereas it ought to have been a Bill of Revivor and Supplement. The Court considered this a valid objection, and ordered the Cause to stand over, with leave to the Plaintiff to amend.

On the 24th July, the Plaintiff obtained an Order to amend, as he should be advised, amending the Defendant's office copies; and afterwards Subpoenas were served on the Defendants to appear to and answer the amended Bill. On the 9th November, *Greaves* entered his Appearance; and on the 19th of the same month, the Plaintiff's Clerk in Court gave notice to *Greaves's* Clerk in Court, that, unless a Commission to take his Answer was sued out before the 25th November, an Attachment would be issued against him. The Commission was not obtained within that time, and the Attachment issued on the 25th November. On the 30th November, on search being made in the Cause Books of the Clerk in Court, in which the Amendments ought to have been entered, it appeared that no entry was made of any Amendment, pursuant to the Order to amend. On the 2d of December, however, the Plaintiff caused the entry to be made. *Greaves's* Clerk in Court, at the time when he received instructions to

enter an Appearance for him, applied to the Six Clerk, in whose division the Cause was, to have the Record of the amended Bill ; but was informed, that it was not in the Study of the Six Clerk, and could not be found at that time.

1822.

ADAMSON
v.
BLACKSTOCK
and others.

By an Affidavit filed on the part of the Plaintiff, in opposition to this Motion, it was stated that the record of the Bill was amended in Trinity vacation, and that the other Defendants had left their office copies to be amended, and that they had been amended accordingly ; but that the Defendant *Greaves* had not, prior to the issuing of the Attachment, left his office copy of the Bill to be amended.

Mr. *Agar*, in support of the Motion, insisted on the uniform practice, that when a Bill is amended there must be an entry in the Book kept for that purpose at the Six Clerk's Office. In the present Case, he admitted that the Sixty Clerk had, before the Attachment issued, done all that was necessary as to amending the Bill, except that he neglected entering it in the Book. That neglect must be considered as fatal, and the entry made after the Attachment issued, was too late.

Mr. *Bell*, for the Plaintiffs, opposed the Motion. The Amendment was not such as required an Answer, therefore no entry in the Six Clerk's Book was necessary. The Defendant had applied at the wrong place, having gone to Six Clerk's Study, instead of going to his Seat. Those Defendants who had brought their office copies to the Plaintiff's Clerk in Court, had them regularly amended ; and if there was any irregularity in this Case, it was owing to the conduct of the Defendant himself, and not to the Plaintiffs, who had

1822.

ADAMSON

v.

BLACKSTOCK
and others.

done all that was necessary on their part. *Lloyd v. Lloyd (a).*

The *Vice-Chancellor* said, he would refer it to the Six Clerks to certify what was the practice on the point in question.

His *Honor* accordingly caused a question as to the practice, to be addressed to the Six Clerks; who thereupon returned the following Certificate :—

“ The Six Clerks humbly certify to your *Honor*, that
“ an amended Bill is not to be considered as on the file
“ for the purpose of an Attachment for want of an
“ Answer, before an entry is made of the Amendments
“ in the Six Clerk’s Book ; and that there is not any
“ difference in this respect between the Amendments
“ of a Bill which has been answered, and the Amend-
“ ments of a Bill which has not been answered.

“ (signed) *Hanmer*, for self and Brethren.

“ Dated this 17 December 1822.”

The *Vice-Chancellor*, upon receiving this Certificate, ordered the Attachment and all Proceeding thereon, to be discharged for irregularity, with Costs.

(a) 2 Cox. 431.

GREEN v. THOMSON.

1822.
10th & 18th Dec.

ONE of the Defendants (*Reddell*) being in Contempt for want of an Answer, put in his Answer, and tendered to the Plaintiff the Costs of his Contempt. The Plaintiff refused to receive the Costs. The Defendant, after the usual interval, obtained an Order for the Dismissal of the Bill, for want of Prosecution.

Contempt.

A Defendant, in order to clear his Contempt, must not only tender the Costs, but, if they are refused, must also obtain an Order for discharging his contempt.

Mr. *Pepys*, for the Plaintiff, moved to discharge the Order for the Dismissal of the Bill, on the ground that it had been irregularly obtained, inasmuch as the Defendant, at the time when he moved for it, was in Contempt. When the Costs of a Contempt are refused, the Party continues in Contempt till the Court makes an Order on the subject. *Coulson v. Graham* (a).

Mr. *Treslove* opposed the Motion.

The *Register* (Mr. *Walker*) was referred to as to the practice, and the Motion was ordered to stand over till the next Seal day, that the practice might be ascertained. On that day the *Register* furnished the following Cases, which showed the practice to be as was contended for on the part of the Plaintiff; *Rowe v. Jarrold*, 26 Feb. 1820, and *Jones v. Powde*, 7 Nov. 1822. The practice was laid down to be as follows, by

THE VICE-CHANCELLOR:—

Where a Defendant is in Contempt for want of an Appearance or of an Answer, and enters his Appearance or files his Answer, and then tenders to the Plain-

(a) 1 V. & B. 331.

1822.

GREEN
v.
THOMSON.

tiff the Costs of his Contempt, and those Costs are refused, it is necessary, in order that he may be discharged from his Contempt, that he should obtain an Order for that purpose, which is made as of course, upon the Six Clerk's Certificate of his Appearance or Answer, and upon the payment or tender of the Plaintiff's Costs of the Contempt.

Jones v. Mudd 4 Ruf. 118.

1822.

19th December.

ESDAILE v. STEPHENSON.

Vendor and Purchaser—Interest—Compensation.

THIS was a Suit for the specific Performance of an Agreement for the Purchase of an Estate.

Where the Conditions of Sale provide that Interest shall be paid from a certain day, if the Purchase be not then completed, the Purchaser cannot relieve himself from payment of Interest, by alleging that the delay in completing the Contract was caused by the Vendor: but it is otherwise where there is no express Stipulation.

The Conditions of Sale stipulated, that, if the Conveyance was not executed by the necessary Parties, and the Purchase Money, paid on or before the 24th day of December 1819, the Purchaser should pay Interest on the Purchase Money, at 5 l. per cent, until the Purchase should be completed. The Estate was subject to Quit Rents, for which the Master had reported the proper Compensation to be made out of the Purchase Money.

The Cause now came on for further directions.

Mr. Sugden, on behalf of the Purchaser, insisted, that it was the fault of the Vendor, that the Purchase had not been completed at the time stipulated in the Conditions, and that he ought not, therefore, to benefit by his own delay, by taking the subsequent Interest at 5 l. per

Quit Rents, being Incidents of Tenure, are proper subjects of Compensation.

Quere, as to Rent Charges, which are not Incidents of Tenure; though the Court has allowed them, when small, to be subjects of Compensation.

Butcher v. Brown v. De Visser 1 Mac N. & G. 336

Robinson v. Skilton 12 Bea. 363.

cent, which was much more valuable than the Mesne Profits of the Estate. He also insisted upon the hardship of compelling a Purchaser to complete his Contract, where there were Quit Rents on the Property; on account of the difficulty it occasioned upon a re-sale of the Estate in Lots, where every Purchaser who was not to pay the whole Quit Rents, was to be indemnified in respect of the part not to be paid by him.

1822.
ESDAILE
v.
STEPHENSON.

The VICE-CHANCELLOR:—

Where there is no Stipulation as to Interest, the general rule of the Court is, that the Purchaser, when he completes his Contract after the time mentioned in the Particular of Sale, shall be considered as in Possession from that time, and shall from thence pay Interest at 4*l.* per cent, taking the Rents and Profits. If, however, such Interest is much more in amount than the Rents and Profits, and it is clearly made out that the delay in completing the Contract was occasioned by the Vendor, there, to give effect to the general rule, would be to enable the Vendor to profit by his own wrong; and the Court, therefore, gives the Vendor no Interest, but leaves him in Possession of the interim Rents and Profits.

In the present Case, the Interest does not depend upon any rule of the Court, but upon the express Stipulation of the Parties; and the terms of that Stipulation apply to every delay however occasioned. It is highly probable, but I cannot in reasoning assume it as a necessary consequence, that the Interest must, under all circumstances, exceed the Mesne Profits, so as to infer from thence, that the true intention of the Parties must have been that the Purchaser should pay Interest at 5*l.* per cent, only when the delay in completing the Contract was occasioned by himself. The Purchaser must, under

1822.

ESDAILE

v.

STEPHENSON.

the circumstances of this Case, pay Interest according to the Terms of the Conditions of Sale.

With respect to the other point, I admit the hardship insisted on by the Purchaser in this Case. But it is now settled, that Quit Rents are subjects of Compensation, probably, because they may be regarded as Incidents of Tenure. Rent Charges are not Incidents of Tenure, but are created by the voluntary act of the Vendor, or those under whom he claims. And it would be a good rule, that a Purchaser should not be bound to complete his Purchase, unless they were noticed in the Agreement or Conditions of Sale. I fear that the habit of the Court has been not to proceed upon this distinction between Quit Rents and Rent Charges, but to compel the Purchaser to complete where the Rent Charge is small.

1822.

20th December.

1823.

11th January.

Partnership.

GLASSINGTON v. THWAITES and others.

A temptation to the abuse of Partnership Property is not sufficient to induce the Court to interfere by Injunction.

THE Plaintiff, as one of the Partners in the *Morning Herald* Newspaper, filed this Bill against the other Partners, praying for an Account of the Partnership Dealings, and an Injunction to restrain the Defendants from using the Partnership Effects in the publication of another Newspaper called the *English Chronicle*, of which they (but not the Plaintiff) were Proprietors.

All the Partners in a Publication, except one, being also Partners in a rival Publication, an Injunction to restrain the using of the Effects of the former Partnership, to assist the latter, in consideration of an annual Sum, was refused, where there had been an Agreement, permitting the use on those terms, which had been acted on for many years.—But the Injunction was granted to restrain the use of Partnership Effects, not included in the Agreement.

The *Morning Herald* was divided into ten shares and one half. The Plaintiff was entitled to one of these shares. The Defendant, *Thwaites*, had six shares and a half, and the other Defendants were Proprietors of the remaining three shares. The Articles of Partnership under which these shares were held, were dated in July 1816. By one of the clauses in this Deed, it was provided that a general Meeting of the Proprietors should be held every week, at such time and place as should be fixed by the major part of the Proprietors, whose Votes should, on all occasions, be and be considered, not by number, but in proportion to the value of their respective shares; and that, at every such Meeting, all matters relating to the management of the Newspaper should be settled; and that all Rules, Regulations and Orders, touching the management of the Newspaper, made by the Votes of the majority in value of the Proprietors and Parties interested therein, and then present, should be binding and conclusive on all the Parties to the Deed. This Deed was executed by the Plaintiff, as well as by the other Proprietors.

1823.
GLASSINGTON
v.
THWAITES.

For some time previously to the year 1816, an Evening Newspaper, called the *English Chronicle*, had been carried on, and the Proprietor of that Paper had been also one of the Proprietors of the *Morning Herald*; and both these Papers had for many years been carried on and published at the same place. In the year 1804, an Agreement was made between the Proprietor of the *English Chronicle* and the Proprietors of the *Morning Herald*, by which the former Paper was allowed to have the use of the Types and other Effects belonging to the Partnership of the *Morning Herald*, in consideration of the Sum of 200*l.* a year. This Agreement subsisted in 1816, and the Proprietors of the *Morning*

1823.

GLASSINGTON

v.

TREWATER.

Herald, under the Deed of July 1816, continued to act on the same Agreement, and to allow to the *English Chronicle* the use of the Types and Partnership Effects, and to receive the annual Sum of 200*l.* as the price of this convenience.

In the year 1821, the Proprietor of the *English Chronicle* offered to sell that Paper to the Proprietors of the *Morning Herald*, who, with the exception of the Plaintiff alone, accepted the Offer, and purchased that Paper. Thus the two Newspapers were united under the same Proprietors, except that the Plaintiff had a share in the *Morning Herald* only, and had no interest in the *English Chronicle*. After this Purchase, a new Agreement was entered into, by which the *English Chronicle* was to pay an annual Sum of 250*l.* instead of 200*l.* to the *Morning Herald*, for the use of the Types, &c. Under this new Agreement, the Plaintiff and the other Proprietors of the *Morning Herald* continued to allow to the *English Chronicle* the use of their Types and Partnership Effects, till August 1822, when the Plaintiff caused a Notice to be served on the Defendants that this Agreement must be discontinued, and none of the Effects of the *Morning Herald* used for the *English Chronicle*.

The Plaintiff stated, by his Bill, that he had for many months been excluded from his Rights as a Partner in the *Morning Herald*, and that the Effects of the Partnership in that Paper were misapplied to the use of the *English Chronicle*; that, Intelligence obtained at the expense of the *Morning Herald* had been first used for the *English Chronicle*, by which means it was rendered of no value to the *Morning Herald*; and that the name of the Plaintiff was used without his consent, as

Publisher of the *English Chronicle*. The Bill, therefore, prayed that an Account might be taken of the Partnership Dealings and Transactions under the Deed of July 1816; and that the Defendants might account for the Profits made by them of Intelligence first published in the *English Chronicle*, though obtained at the expense of the *Morning Herald*; and for an Injunction to restrain the Defendants from using the Types or Partnership Effects of the *Morning Herald* for the *English Chronicle*, and from using the Plaintiff's name as the Publisher of the latter Paper.

1823.
GLASSINGTON
v.
THWAITES.

The Defendants, by their Answer, insisted on the Terms of the Partnership Deed of July 1816. That the Plaintiff had greatly misconducted himself, and had not duly accounted for Balances of the Partnership Money in his hands, but was indebted to the Concern to the amount of 300 *l.* and upwards; that, in consequence of his misconduct, the Defendants, who were the majority in number and in value of shares, had been compelled to exclude him from interfering in the management of the Paper; that the Agreement with the *English Chronicle* was beneficial to the *Morning Herald*, not only on account of the annual sum of 250 *l.* which was paid for the use of the Types and other Effects, but also because the *Morning Herald* had the use of the Types composed for new matter in the *English Chronicle*, and had also the general use of the Types of that Paper. They also insisted on the fact, that the Plaintiff had, for many years, consented to this Agreement, as beneficial to the *Morning Herald*, and that no new circumstances had occurred to render it less beneficial than at former periods. It appeared that Intelligence, obtained at the expense of the *Morning Herald*, had on one occasion only, (many months before this Bill

1823.

GLASSINGTON

v.

THWAITES.

was filed) been first used in the *English Chronicle*; and that the Plaintiff's name had only been used on one occasion (through the mistake of a workman and without the knowledge of the Defendants) as the Publishers of the *English Chronicle*.

The Court was now moved, on behalf of the Plaintiff, for an Injunction to restrain the Defendants from using the Compositors, Types, or other Partnership Property of the *Morning Herald*, for the use of the *English Chronicle*, and from using the name of the Plaintiff as the Publisher of the latter Paper.

Mr. Bell, and Mr. Roupell, in support of the Motion, insisted on the facts stated by the Plaintiff in his Bill, and supported by his Affidavit. The Plaintiff sought for an Injunction, as the means of preventing a misapplication of the Partnership Effects for other purposes than those of the Partnership; and the principles of the Court, in cases of Partnership, recognised the right to an Injunction in cases of this nature.

Mr. Agar and Mr. Parker for the Defendants :—

I. This is not one of those Cases in which the Court will interfere by an Injunction at this stage of the Cause. In the present Case, the Injunction is sought, for the purpose of furthering the Articles of Partnership. There is no principle of the Court on which an Injunction can be granted for such a purpose. The only Cases in which the Court grants an Injunction on Motion are, 1st, where waste, or an injury in the nature of waste, is threatened or committed; 2d, where it is to prevent an irremediable injury. If the Court were to extend the practice of granting Injunctions to aid the execution of Covenants in Articles of Partnership, it would be called

upon to interfere in the management of almost every Partnership in the Kingdom (a).

1822.

GLASSINGTON

v.

THWAITES.

II. The Bill does not pray for a Dissolution of the Partnership, and yet it prays for an account of the Partnership dealings and transactions. It is the settled principle of the Court not to interfere in a Partnership concern, unless the Bill prays for a Dissolution of the Partnership. *Forman v. Homfray* (b). In that Case it

(a) In *Peacock v. Peacock*, 16 Ves. 51, it was said by the Lord Chancellor, that the Court has interposed in Cases of Partnership, upon principles, not the same, but analogous to those on which it interposes in the case of Waste. In a very able work on the Law of Partnership, lately published, it is laid down as the doctrine deduced from the Cases, and in the words of Lord Eldon, in *Marshall v. Colman*, "that Courts of Equity will interfere where a breach of any of the Covenants contained in the Articles of Partnership has been committed, if the breach be so important in its consequences as to authorize the Party complaining to call for a Dissolution of the Partnership." Gow on Partnership, 135. There seems, however, to be some inconsistency in the doctrines applied to the various Cases which have been reported; see *Marshall v. Colman*, 2 J. & W. 268. *Goodman v. Whitcomb*, 1 J. & W. 592. *Smith v. Fromont*, 2 Swanst. 330.

(b) 2 V. & B. 329. As to the Cases in which it has been held necessary that the Bill in a Suit between Partners, should pray for a Dissolution of the Partnership—see *Harrison v. Armitage*, 4 Madd. 143. *Marshall v. Colman*, 2 J. & W. 268. *Goodman v. Whitcomb*. 1 J. & W. 592. *Master v. Kirton*, 3 Ves. 74. It does not seem very easy to reconcile the principles which have been laid down in various Cases, as to the Dissolution of Partnerships for a term of years, before the term has expired. In *Goodman v. Whitcomb*, 1 J. & W. 593, it is said by Lord Eldon, that the Court will not interfere to dissolve the Partnership, (before the period fixed in the Contract) unless there be "conduct amounting to an entire exclusion of the Partner from his Interest in the Partnership." But when that proposition was laid down, the Court had fallen into an analogy which seems somewhat fanciful, between the doctrine of the Ecclesiastical Court as to the Dissolution of the Matrimonial Contract, and the doctrine of the Court of Chancery as to the Dissolution of Partnerships in Trade. See his Lordship's excellent Judgment, in *Marshall v. Colman*. In *Baring v. Dix*, 1 Cox, 213, the Court dissolved the Partnership before the term had

1822.

GLASSINGTON

v.

THWAITES.

was expressly decided there can be no Bill for an account between Partners, unless it also prays for a Dissolution.

III. The Injunction is sought to restrain acts which were done for many years with the consent of the Plaintiff himself; acts done under an arrangement which was deemed beneficial to the *Morning Herald* by the Plaintiff, long before, and even since, the Defendants had become Proprietors of the *English Chronicle*. The effect of granting the Injunction now, would be instantly to destroy the *English Chronicle*.

The *Vice-Chancellor* was at first inclined to grant the Injunction; but said, that as the practice complained of had existed for some time; as the Injunction, if granted now, could not be dissolved till the first Seal before next Term (this being the last day on which the Court would sit before the Christmas vacation); and as the immediate effect of the Injunction might be to ruin the Concern, although the superior Court on appeal should be of opinion it ought never to have issued; he should not deliver his Judgment on this Motion, till after the vacation.

expired, (although one of the Partners refused to consent to the Dissolution) on the ground that it could not be beneficially continued, with a view to its object. In *Chapman v. Beach*, 1 J. & W. 594, it was held that a breach of faith between the Parties, was a reason why the Court should decree a Dissolution; and nothing was said as to exclusion of any of the Partners from their Interest in the Partnership. As to other Cases, in which Dissolution before the expiration of the term has been decreed on other grounds than those of entire exclusion of a Partner from his rights; see *Beaumont v. Meredith*, 3 V. & B. 180, and the Cases collected in Mr. Gow's Treatise, 281.

Quære. Whether the Court will ever interfere on an interlocutory application for a Receiver or Injunction, in the Case of a Partnership occasioned by the acts of the Parties, unless on circumstances clearly established, of fraud, entire exclusion, or gross misconduct?

The VICE-CHANCELLOR:—

The practice complained of by this application, is defended as being the act of a majority of the Partners, who, by the express terms of the Partnership Articles, are entitled to bind the minority; and the Plaintiff is the only Partner who objects to it.

1823.
16th January.
GLASSINGTON
v.
THWAITES,

And it is further stated, that the Plaintiff himself concurred in the propriety of this practice, until his Co-partners purchased this Evening Paper, and that it is the same thing, in effect, as to the interest of the Plaintiff, whether the Evening Paper belongs to his Co-partners or belongs to Strangers.

The right of the majority to decide, is necessarily confined to matters which occur in the conduct of the Partnership concern.

All Newspapers are to some extent rivals. The competition is more immediate between two Morning Papers and two Evening Papers; but there is necessarily some degree of rivalry between a Morning and an Evening Paper, especially in the country. It might, therefore, have been made a Question, whether it would be a due act of management in the Partnership concern of a Morning Paper, to assist with its Property and its Labour the Publication of any other Newspaper, so as to enable the majority of the Partners in that respect to bind the minority. But that Question does not arise; because the Plaintiff himself is to be considered as a Party to the practice before his Co-partners became the Proprietors of the Evening Paper; and because there is Evidence that the Proprietors of other Morning Papers have adopted the same practice with respect to other Evening Papers, so as to form a sort of usage in the

1823.

GLASSINGTON

v.

THWAITES.

trade to this effect. And it is to be considered, that the annual sum paid by the Evening Paper, for the accommodation afforded to it, outweighs the danger of increased competition.

The true question here is, whether it makes any difference, that the other Proprietors of the *Herald* have now become the Proprietors of the Evening Paper; and I think it does not make a material difference. It is true, that a considerable part of the expense of a Newspaper is occasioned by procuring Information; and if some of the Proprietors of a Morning Paper are also the Proprietors of an Evening Paper, they may have a stronger interest to promote the success of the Evening Paper than of the Morning Paper, and a strong temptation to use the Information obtained at the expense of the Morning Paper for the benefit of the Evening Paper. This temptation forms a powerful objection in all cases to the Partner in the concern of one Newspaper being permitted to be a Partner in the concern of any other Newspaper. But it is an objection founded on the principle of policy and discretion, against which, parties may protect themselves by their Contracts; and accordingly, it is a common Covenant in such Partnership Articles, that no Partner shall be the Proprietor of any other Newspaper. In the present Case, there is actually a Covenant, that the Proprietors will not be concerned in any other Morning Paper, which by implication, affords the conclusion, that it was the intention of the Parties, that they might engage in the concern of any *Evening* Paper.

Where there is no such Covenant of restraint, it is clear, that at Law, a Partner in one Newspaper may be a Proprietor in any other Newspaper; and in this Case,

Equity must follow Law; and it cannot be intended, that the Parties meant to impose a restraint, which they might have expressed, and have not expressed, and where it is plain their attention was directed to the subject.

1823.
GLASSINGTON
v.
THWAITES.

The principles of Courts of Equity would not permit that Parties bound to each other by express or implied Contract to promote an undertaking for the common benefit, should any of them engage in another Concern, which necessarily gave them a direct interest adverse to that undertaking. But the argument here is, not that the Defendants, by becoming the Proprietors of the Evening Paper, place themselves in a situation in which they are necessarily required to betray their duty to the Morning Paper; but that, if their interest be greater in the Evening Paper than in the Morning Paper, they are exposed to a temptation to be dishonest and to betray their duty to the Morning Paper. If they act honestly, it is immaterial to the Morning Paper whether the Defendants are or not the Proprietors of the Evening Paper. And for this reason it is, that it makes no difference in the present Case that the Defendants have become the Proprietors of the Evening Paper.

His Honor refused the Injunction generally; but allowed the Plaintiff to take an Injunction to restrain the Defendants from publishing in the *English Chronicle* any Information obtained at the expense of the *Morning Herald*, until it should have been first published in the *Morning Herald*.

1893.

GLASSINGTON

v.

THWAITES.

Practice.

On a Motion for an Injunction, Affidavits filed before the Answer, may be read, where the Plaintiff, by saving the Notice of Motion till a future day, enabled the Defendant to file his Answer before the Motion was made.

In this Case, the Notice of Motion served by the Plaintiff expressed that the Injunction would be moved for on the 16th December, and the Affidavits of the Plaintiff were filed before that day; but the Counsel for the Plaintiff did not bring on the Motion on the 16th, but saved the Notice till the 20th of December, which was the next day for Motions. Before the Motion was made on the 20th, the Defendants filed their Answer.

When the Motion was made, Mr. *Agar*, and Mr. *Parker*, for the Defendants, insisted that the Plaintiff ought not to be allowed to read his Affidavits, because the Answer was filed.

Mr. *Bell*, and Mr. *Roupell*, for the Plaintiff, insisted on their right to read the Affidavits, as the Answer had been filed after the day fixed for the Motion by the Notice.

The *Vice-Chancellor* held, that the Affidavits might be read in opposition to the Answer; and that the circumstance of the Plaintiff having afforded an opportunity for the Answer, by saving his Notice of Motion, made no difference (a).

(a) See *Goodman v. Whitcomb*, 1 J. & W. 589.

*See Burch v. Rich 1 Keppel -
186. l. m. m.*

WEBSTER v. THRELFALL.

1823.
16th January.

A DEMURRER had been put in to the original Bill in this Cause, and, on argument, was allowed; but the Plaintiff had leave to amend his Bill. The Bill was amended accordingly; and the Draft of the Amendments was signed by the Counsel, whose Signature appeared to the original Bill. The Amendments were interlined in the Engrossment of the original Bill, and the Name of the Counsel remained after the Amendments had been made, without being repeated, and without any thing appearing on the Record to indicate that the Amendments had been signed by Counsel.

Practice.

Where the Draft of an amended Bill is signed by the same Counsel who signed the Draft of the original Bill, and no new Engrossment is required, Counsel's Name need not be repeated on the Engrossment.

The Defendant now moved, that the amended Bill might be taken off the file for irregularity, because it did not appear to be signed by Counsel.

Where a Defendant enters his Appearance *gratis*, the time within which he must answer or sue out a Commission, is to be calculated from the date of his actual Appearance, and not from that at which the *Subpoena* would have been served, if he had waited till the regular service.

Mr. Bell, and Mr. Spence, for the Defendant.

The Court must have the sanction of Counsel for what appears on its Record. If the name of Counsel attached to the Record of an original Bill, is to be considered a sufficient sanction for any Amendments which may afterwards be made, it is obvious that the Court would be liable to have Amendments interlined without the protection of Signature by any Counsel. If the Name attached to the original Bill is sufficient, then any Solicitor's Clerk may make what Amendments he pleases under the sanction of the first Signature. Such a practice is subversive of the invariable

1823.

WEBSTER

v.

THRELFALL.

policy of the Court. *Pitt v. Maclew* (a) is a Case in point.

Mr. *Koe* opposed the Motion, and stated that he had himself signed not only the Draft of the original Bill, but also the Draft of the Amendments. He stated also, that the practice was understood to be, that the repetition of the Name of Counsel to the Engrossment was not usual, where the Draft of the Amendments was signed by the same Counsel who had signed the original Bill.

(a) Through the kindness of Mr. *Bickersteth*, we are enabled to give the following note of this Case :—

PITT v. MACKLEW.

1820.

12th May.

THE original Bill in this Case was signed by Mr. *Parker*, as Counsel for the Plaintiff.

Bill, amended by interlineation, ordered to be taken off the file for irregularity, neither the Draft nor the Engrossment of the Amendments being signed by Counsel, though there was no new Engrossment of the Bill.

On the 25th April 1820, the Plaintiff obtained an Order to amend the Bill. Having obtained this Order, the Plaintiff went himself personally to the Six Clerk's Office, unaccompanied by any Solicitor, and, having got access to the Engrossment of the Bill, he amended it by making several interlineations. These Amendments were not made from any Draft signed by Counsel, nor was the Name of Counsel repeated on the Engrossment, as having sanctioned the Amendments.

On the 12th May, a Motion was made on behalf of one of the Defendants, that the amended Bill might be taken off the file, for irregularity, because it was not signed by Counsel. An Affidavit in support of the Motion was made by the Solicitor of the Defendant, which stated, that he (the Solicitor) had applied to Mr. *Parker*, to know whether he had signed the amended Bill, and was informed by him that he had neither signed it, nor authorised any other person to sign it for him.

Mr. *Bickersteth* for the Motion.

The *Vice-Chancellor* ordered the amended Bill to be taken off the file, and the Plaintiff to pay the Costs.

The *Vice-Chancellor*, said he must refuse this Motion with Costs, because it was against all practice that the Name of Counsel should be repeated to an amended Bill, where there is no new Engrossment; and because, when Counsel amends his former Draft, which has his Signature to it, his Signature is to be applied as well to the Amendments as to the original Draft. If it is not necessary to repeat the Name upon the Draft, it could not be necessary to repeat it upon the Record. If another Counsel were to make the Amendment, then it would be necessary that there should be a second Signature.

1823.

WEBSTER
v.
THRELFALL.

In this Case the Defendant had appeared *gratis*, and he insisted that as he had done so, without service of the *Subpœna*, he was only bound to answer at such time as would have been allowed by the rules of the Court, he had waited the regular service of the *Subpœna*. The time, therefore, was to be calculated from the date at which the *Subpœna* would have been served in the regular course.

16th January.

The *Vice-Chancellor* held, that the circumstance of appearing *gratis*, made no difference, because the time allowed by the rules of the Court after appearance, necessarily applies to the actual appearance, without regard to the motive, and that it would be highly inconvenient if it were otherwise.

1823.
16th January.

*Guardian and
Ward.—Injunction.*

Where a Guardian, after his Ward attains full age, continues to manage the Property at the request of the Ward, and before the Accounts of his Receipts and Payments during the minority are settled, it is, in effect, a continuance of the guardianship as to the Property; and he must account on the same principle as if they were transactions during the minority.

Under these circumstances, an Injunction was granted, on terms, to restrain the Guardian from proceeding in an Action to recover the balance claimed by him on account of the transactions after his Ward came of age.

MELLISH v. MELLISH.

THE Defendants were the paternal Uncles of the Plaintiff, and had been her Guardians during her Minority. The Bill prayed for an account against them; and for an Injunction to restrain the Defendant, *William Mellish*, from proceeding in an Action at Law, which he had brought against the Plaintiff, to recover the sum of 22,325 *l.* 10 *s.* 2 *d.* alleged to be the balance due to him, on account of his receipts and payments, since she had attained the age of twenty-one years.

John Mellish died in 1798, leaving the Plaintiff, *Catherine Martha Mellish*, his Daughter and only Child, at that time an Infant only two years of age. He made his Will, of which he appointed his three Brothers, the Defendants in this Cause, *William, Edward, and Thomas Mellish*, the Executors; and he also appointed them Guardians of the Plaintiff.

The Bill in this Cause was filed several years after the Plaintiff had come of age; and it set forth the Will,—stated various acts of improvidence and mismanagement, by the Defendants, as to the Property claimed by her under the Will; that she had been unable, for several years, to obtain from the Defendants a Statement of their Accounts; that, when the Accounts were delivered, it appeared that 14,372 *l.* 15 *s.* had been laid out, during her Minority, in the purchase of Lands for her, but that these Lands were conveyed to the Defendants, and were still vested in them, although they had charged the Plaintiff with the Money laid out on them; that they had continued in the management of her affairs,

1823.

MELLISH
v.
MELLISH.

after her attaining the age of twenty-one; and that it appeared by Accounts lately delivered, that they claimed a balance of 22,325 *l.* 10 *s.* 2 *d.* to have become due to them from the Plaintiff, since she had attained twenty-one, although only 11,105 *l.* 8 *s.* 2 *d.* had, in fact, been advanced to her since that time, and that an Action had been brought against her by the Defendant, *William Mellish*, to recover this alleged balance of 22,325 *l.* 10 *s.* 2 *d.* The Bill charged, that the Accounts on which this balance appeared, were, in fact, only a continuation of the Accounts during the Minority; that they were made out in the name of *William Mellish* only, although the other Defendants were equally liable with him; and that if proper Accounts were taken, it would appear that a large balance was due to the Plaintiff. The prayer of the Bill, therefore was,—First, for an Account of the Property to which the Plaintiff was entitled under the Will;—Secondly, for an Account of the Estates purchased with the 14,372 *l.* 15 *s.* and that the Defendants might be decreed to convey them to the Plaintiff;—and Thirdly, for an Injunction to restrain all Proceedings at Law by the Defendants, in respect of any of their Accounts, and, especially, to restrain Proceedings in the Action brought by *William Mellish*.

The Answer of the Defendants denied all the charges of improvidence and mismanagement; and stated, that the Defendant, *William Mellish*, alone had acted in the receipts and payments on account of the Plaintiff's affairs; that the Defendants were very desirous that the Plaintiff should be informed of the state of her affairs when she came of age; and that, accordingly, in the month of January 1817, which was a few months before she attained the age of twenty-one, the Defendant, *William Mellish*, wrote her the following letter:—

1823.

MELLISH

v.

MELLISH.

“ As the period at which you will be of age is nearly
“ arrived, and as you will remain in town with your
“ Aunts for some days previous to your joining the
“ Party at _____; I have transmitted to you
“ some papers which I wish you, during that time, to
“ peruse with the greatest attention. Your Uncle and
“ myself were, upon the perusal of your Father’s Will,
“ so doubtful as to the proper construction that ought
“ to be put upon it, that, without delay, we consulted
“ three of the most eminent Counsel, at that time, at
“ the Bar, Sir *John Mitford*, now Lord *Redesdale*,
“ afterwards Chancellor of Ireland, the late Mr. *Shad-*
“ *well* and Sir *Samuel Romilly*; and amongst the Papers
“ sent you, you will find a Copy of your Father’s Will,
“ as well as of the Case laid before Counsel, with the
“ several Opinions thereon. We have been guided by
“ their Opinions in all legal points respecting the Pro-
“ perty that you took under the Will, though, in the
“ management of your Concerns, we have, in some in-
“ stances, deviated from the strict legal line of conduct
“ pointed out by them, conceiving it was for your benefit
“ to do so; we should not have fulfilled our duty as
“ your Guardians, if we did not take upon ourselves
“ that responsibility, rather than forego the opportunity
“ thus offered of eventually improving your Property.
“ Under these circumstances, it would be extremely im-
“ proper in us to proceed to any settlement of your Ac-
“ count, without having them inspected and examined
“ by some respectable Solicitor on your behalf, and for
“ the same reason, it would be equally improper in us to
“ name or give you any recommendation as to the person
“ to be employed by you for that purpose upon the
“ subject. We do not conceive that there can be any
“ person so proper for you to consult as the nearest

“relations to your Mother, and we know that they will
“give you every assistance and advice in their power.”

1823.

MELLISH

v.

MELLISH.

In consequence of this Letter, a Solicitor was appointed by the Plaintiff; and under his management, on the 18th of June 1817, a few months after she attained twenty-one, the Accounts of the Plaintiff with the Defendants, in respect of transactions under the Marriage Settlement of her Father and Mother, but not in respect of her affairs under the Will, were finally settled and signed by her, and she executed a Release as to these Accounts to the Defendants.

The first application by the Plaintiff for a Settlement of the other Accounts (which were those mentioned in the Bill), was in May 1817; and in the Letter by which she made this application, she stated that it was her intention to go abroad, for the purpose of visiting the Continent, on the 20th of June following; and, therefore, begged that the Accounts might be prepared as speedily as possible. The Defendant, *William Mellish*, in answer to this Letter, begged her to defer her journey for some time longer, until the Accounts could be prepared, and added, that they were then in progress.

At the time when the Plaintiff came of age, *William Mellish*, who had frequently communicated with her on the state of her affairs, gave her a written Statement of her annual Income, so far as he was then able to ascertain it. She did not wait till the Accounts were prepared, but went abroad on the 2nd of July 1817. Before she went, by a Letter, dated 24th June 1817, and addressed to the Defendant, *William Mellish*, she requested him to continue in the management of her affairs. That Letter was as follows:—

1823.

MELLISH

v.

MELLISH.

" I have often thought it would be giving too much trouble to ask you still to continue the superintend-
 " ance of my concerns at Hamels ; but if that is not the
 " case, I shall be infinitely indebted to you and my Uncle
 " Tom for doing so ; and I am perfectly aware of the
 " advantages that have hitherto resulted to myself from
 " your management of them."

In consequence of this Letter, the Defendant, *William Mellish*, continued to act on behalf of the Plaintiff, and to receive the Rents and Profits of her Property ; but he stated that he considered his management of her Property under the authority of this Letter, as a continuance of the management, different from what it had been during the Minority, and on a new footing ; and, therefore, that he had kept new Accounts of it, distinct from those which he had kept during the Minority and the Guardianship.

After the Plaintiff had gone abroad she wrote repeatedly to the Defendant, *William Mellish*, requesting that she might be furnished with the Statement of the general Accounts of her affairs to the end of her Minority. But, in answer to these applications, he always stated, that her own presence was necessary in order to have the Accounts properly settled. In September 1818, the Plaintiff wrote to say, that she had appointed Mr. *Charles Warren* to examine the accounts on her behalf. An Abstract of the Accounts was accordingly examined by this Gentleman, who approved of them, on her behalf, and expressed his conviction that the Defendants had, in all matters, acted as was best for her interests.

In January 1819, the Plaintiff appointed new Solicitors.

1823.

MELLISH
v.
MELLISH.

tors to act for her; and on the 5th July 1819, the whole of the Minority Accounts were delivered to her by the Defendant *William Mellish*; and, on the 10th of the same month, he delivered his Accounts of her affairs during the period since she had attained the age of twenty-one. By the Minority Accounts, there appeared to be a balance of 13,194*l.* 9*s.* 4*d.* due from the Plaintiff to the Defendant *William Mellish*. For the recovery of this sum no Action was brought. It was for the balance of 22,325*l.* 10*s.* 2*d.* which appeared due to him on the other Accounts, since the Minority, that the Action was brought; and, of this sum, the Defendant *William Mellish* stated that 14,947*l.* 4*s.* 8*d.* was due for Money advanced by him to the Plaintiff herself, personally, since she had attained twenty-one; and the rest was for sums paid to various Persons on her account, after deducting all sums received by him in respect of her Property.

The Answer also stated, that, when these Accounts were delivered, the Plaintiff had refused to settle them, unless the Defendants would agree to open the Accounts under the Marriage Settlement, which had been signed and settled by the Plaintiff in June 1817. And the Defendants said they did not believe that any of the Items in the Accounts, since she attained the age of twenty-one, depended on any disputed Items in the Minority Accounts; and that the Plaintiff, although she had been repeatedly pressed to point out any Items in the Minority Accounts which she disputed, had refused to do so; and that the Defendants were, therefore, ignorant what the Items were which she disputed:

As to the Estates purchased for her during the Minority, it was stated that the Plaintiff herself had, since

1823.

MELLISH
v.
MELLISH.

she came of age, elected to take these Estates, was in possession of the Title Deeds, and in receipt of the Rents and Profits.

The Plaintiff had obtained the Common Injunction for want of an Answer; and an Order having been obtained to dissolve the Injunction *Nisi*, upon the coming in of the Answer, the Plaintiff now shewed cause, on the merits, against dissolving the Injunction.

Mr. *Wetherell*, and Mr. *Pepys*, for the Plaintiff, insisted that the Management, since she had come of age, was a continuance of that during the Minority, and was to be treated on the same footing; and, therefore, that the Guardian could not be allowed to recover an alledged balance on a disputed Account, till the Accounts had been taken under the direction of the Court, and that the Parties were to be considered as being involved in an Account depending on equitable principles.

Mr. *Bell*, Mr. *Horne*, Mr. *Heald*, and Mr. *Pechell*, for the Defendants.

I. The Account, subsequent to the period when the Plaintiff came of age, is a common legal Account, and the relationship of Guardian and Ward ceased with the Minority. Admitting that the Accounts during the Minority cannot be made the subject of a demand at Law, but must be settled in this Court, there is no principle on which the Defendant, *William Mellish*, can be restrained from proceeding at Law to recover Money advanced by him to the Plaintiff since she attained the age of twenty-one. When she began to draw on him for Money, after she came of age, there was an end to the relationship of Guardian and Ward. He was then managing her affairs, not in that situation, but under the

authority given to him by her letter of the 24th June 1817. The substance of that letter was, the continuance of the management on a new footing. There was from that time a new Agency and a new Account.

1823.

MELLISH
v.
MELLISH.

II. Admitting that as to the management, it was, under this letter, to be considered as on the old footing, it is impossible to say that of Money actually advanced —of payments made to the Plaintiff by Mr. *William Mellish*, out of his own pocket. These cannot be considered as the advances of a Guardian to his Ward. It was by her conduct and her acts after she came of age, that he was involved in this new Account; for, if she had not gone abroad, the Accounts would have been sooner settled, or if disputed, these advances would not have been made.

III. It is not alleged any where in the Bill that the question could not be tried at Law as to this Account on which the Action has been brought.

The VICE-CHANCELLOR :—

The balance claimed by a Guardian from his Ward, can never be ascertained in a Court of Law, because it depends upon principles peculiar to a Court of Equity; and in order to induce this Court to restrain the Action at Law, it is enough to state the relation in which the Parties stood to each other. I consider that the unbroken continuance of the management of the property by the Guardian, after the Plaintiff had attained her age, is, in effect, a continuance of the Guardianship as to the Property; and that the same principles must be applied to this Account as to the Accounts during the Minority. And, of consequence, the Plaintiff is entitled to maintain the Injunction. The question is

1823.

MELLISH
v.
MELLISH.

only as to the terms to which the Plaintiff must submit. It is not denied by the Plaintiff, that certain sums, exceeding altogether 14,000 *l.* were advanced to her personally, by the Defendant, *William Mellish*, after she attained her age, and her Counsel admit that they cannot infer from the present state of the Pleadings that the balance claimed by the Defendants will be reduced to a sum less than that 14,000 *l.*

Let the Injunction, therefore, be continued upon the terms of the Plaintiff paying to the Defendant, *William Mellish*, the amount of the sums so advanced to her, personally, since she attained her age, without prejudice.

Mr. Bell, for the Defendants, pressed the Court to require an undertaking from the Plaintiff to pay interest upon any ultimate balance. But the *Vice-Chancellor* declined this, considering that the Court could hereafter take into consideration the question of interest, as far as it depended upon the Injunction.

This Motion was heard on Appeal before the *Lord Chancellor*. His Lordship on the 20th March, affirmed the decision as to continuing the Injunction, but ordered the Plaintiff to pay into Court the balance remaining due on the Account since she attained her age, after deducting the sum of 14,947 *l.* 4 *s.* 8 *d.* to be paid to the Defendant, *William Mellish*, under the *Vice-Chancellor's* Order.

WYNNE v. GRIFFITH.

1823.
31st January.

THIS was a bill by the Vendor for the specific performance of an agreement for the sale of an Estate, and for an Injunction to restrain the Defendant, the purchaser, from proceeding in an Action to recover the Deposit Money of 1,000 *l.* One of the conditions of Sale was as follows:—"The Purchaser of each lot to pay down immediately to the Vendor's Agent, *for his use*, a deposit of 10 per cent, in part of the Purchase Money, and to sign an Agreement for the payment of the remainder, on or before the 16th day of June next; when he is to be let into possession of the Premises, and to be entitled to the growing Rents from thenceforth."

Vendor and Purchaser.—Practice.

The Court will not compel a Vendor to pay the deposit Money into Court, though he retains possession of the Estate, if the delay in the completion of the Contract is occasioned by the Purchaser.

A Defendant is not a Party seeking the aid of the Court, and, therefore, is not entitled to apply for an interlocutory Order, for his own relief or security, as to the subject matter of the Suit, unless the object of his Motion may be imposed as a condition on an Order applied for by the Plaintiff.

The Sale took place in December 1819; and the Defendant immediately paid the sum of 1,000 *l.* as a Deposit. This was less than 10 *l.* per cent, as the Purchase Money was 14,610 *l.* The Plaintiff delivered an Abstract of his Title within the time fixed by the conditions of Sale, and the Title was approved of by Counsel, on behalf of the Defendant. At this time the same Solicitor acted for both Plaintiff and Defendant. The latter afterwards employed a new Solicitor, and being, as the Plaintiff alledged, unable to raise money to complete the Purchase, the opinion of another Conveyancer, as to the validity of the Title, was taken on his behalf. This latter Counsel raised some objections to the Title, which were, however, removed. Afterwards, other objections were raised, which were either removed, or could, as the Plaintiff alledged, be satisfactorily answered. During the whole of this discussion as to the Title, the Plaintiff remained in possession of

1823.

WYNNE
v.
GRIFFITH.

the Estate; and in July 1822, an Action was brought against him by the Defendant, for the recovery of the Deposit of 1,000 *l.* The Plaintiff then filed this Bill, and having obtained the common Injunction for want of an Answer; after the Answer was put in, the Injunction was continued on the merits.

The Court was now moved, on the part of the Defendant, for an Order to compel the Plaintiff to pay into Court the Deposit Money of 1,000 *l.*

Mr. *Horne*, and Mr. *Willis*, in support of the Motion, insisted, that it was a general rule, that the Deposit was to be considered as part of the Purchase Money, and that the Plaintiff, as Vendor, could not be entitled to retain possession of the Estate and of part of the Purchase Money, at the same time.

Mr. *Sugden*, and Mr. *Newland*, for the Plaintiff, opposed the Motion; insisting, First, that the Defendant was not entitled to come before the Court with such a Motion against the Plaintiff; and that, even if he were entitled to have the Money paid into Court, he could only be entitled to insist on it by a Cross Bill (a).

Second, Admitting that the Court could entertain such a Motion, the Defendant in this case could not be entitled to the Order:—First, because the Conditions of Sale expressed that the Deposit was to be paid to the Plaintiff, for his own use.—Second, because the pos-

(a) As to the right of a Defendant to move in such a case, without a Cross Bill, see *Anon.* 2 Dick. 778; *Micklethwait v. Moore*, 3 Meriv. 292; *Davers v. Davers*, 2 P. W. 410; *Pickering v. Rigby*, 18 Ves. 484; *Wiley v. Pistor*, 7 Ves. 411; *Princess of Wales v. Lord Liverpool*, 1 Swanst. 114.

session of the Estate by the Plaintiff, was occasioned by the delay of the Defendant, and his unwillingness to perform his Contract.

1823.

WYNNE
v.
GRIFFITH.

The VICE-CHANCELLOR:—

The first Question is, whether the Defendant can make such a Motion. Though a Defendant cannot primarily move for any Order for his security, because he is not a Party seeking the aid of the Court; yet, if, at the time of continuing the Injunction, he had brought forward this Claim as to the Deposit, and it had appeared to have been just, the Court would have enforced it; not in the nature of relief to him, but as a condition annexed to the relief given to the Plaintiff. And although the Defendant has neglected the convenient opportunity for the application, yet I think it still open to him, and that I may consider it in principle as a Motion to dissolve the Injunction, unless the Plaintiff pay the Money into Court.

Upon the merits, it appears to me, that the Question is, whether it is the fault of the Plaintiff, and against the will of the Defendant, that the Plaintiff retained both the Deposit and the Estate. And being of opinion, upon the facts appearing by Affidavit and Answer, that the Plaintiff, at the time of the Bill filed, was able and willing to make a good Title to the Estate sold, and that the Defendant improperly refused to complete the Contract; I consider that it is the fault of the Defendant, and not of the Plaintiff, that the Plaintiff retains both the Deposit and the Estate, and therefore I must refuse the Motion.

HEAD v. HEAD.

1823.
17th January,
22d February.

Evidence.—
Legitimacy.

THIS was a Motion for the new Trial of an Issue directed by the *Vice-Chancellor*, upon the question: Whether the Plaintiff was the legitimate Child of one *William Head*.

A Child born of a married Woman, whose Husband is within the four seas, is always to be presumed to be legitimate; unless there is Evidence affording irresistible presumption that sexual intercourse did not take place between them, at any time, when, in the course of nature, the Husband might have been the Father of the Child.

The Issue was tried at the Sittings after Michaelmas Term, 1822, before Mr. Justice *Burrough*; when the Jury found a Verdict for the Plaintiff. The new Trial was moved for, upon the ground of a misdirection by the learned Judge, who had laid down the law to the Jury in the language of Lord *Ellenborough*, C. J., in the Case of *The King v. Luffe* (a), the effect of which was, that where a Child is born of a married Woman, the Husband is to be presumed to be the Father, unless there be Evidence to show the absolute physical impossibility of that fact.

When the Case was first mentioned, it was ordered to stand over, in order that the Court might be furnished with the notes of the learned Judge before whom the Issue had been tried.

In the first argument (b) in favour of the Motion, the *Banbury Peerage Case* was mentioned by the Court; and, as that Case was not reported, though mentioned in some of the Text Books, the Motion was ordered to stand over, in order that an authentic copy of the opinions of the Judges in that Case might be obtained (a); as it seemed to the Court that they must govern its decision in the present Case. After these were obtained, the Motion was brought forward again.

(a) 8 East, 193.

(b) At the first argument Mr. Serjeant *Lens* quoted the Case of *Goodright* dem. *Thompson v. Saul*, 4 T. R. 356.

(c) See *post*. p. 153, 4, 5, 6, 7, 8, 9.

1823.

HEAD

v.

HEAD.

Mr. Serjeant *Lens*, and Mr. *Bell*, in support of the Motion, admitted the rule to be, that there must be irresistible presumptive evidence of non-access, where the Husband and Wife were found in the same Place at a time, when, if sexual intercourse had taken place, the Husband might, in the course of nature, have been the Father of the Child. But they contended, that in this Case, the Jury had given their Verdict under the influence of the Judge's direction, that there must be a moral impossibility that the Husband could be the Father of the Child. If the Judge had merely stated that the Case was one which required overwhelming Evidence as to the presumption of non-access, there would have been no ground for complaint. All that was wanted was, that the Case should go before a Jury, unfettered by any direction or statement of the rule of law, which should make them think it indispensable, in order to establish the illegitimacy, that the actual impossibility of the Husband being the Father must be proved. Admitting that the Evidence must be such as to raise an irresistible presumption that the Husband was not the Father, a Jury had not yet had an opportunity of considering the Case under that impression as to the rule of law.

Mr. *Heald*, appeared for the purpose of opposing the Motion.

The VICE-CHANCELLOR:—

The ancient policy of the Law of England remains unaltered. A child born of a married woman, is to be presumed to be the child of the Husband, unless there is Evidence, which excludes all doubt, that the Husband could not be the Father. But, in modern times, *the rule of evidence* has varied. Formerly, it was considered, that

1823.

HEAD
v.
HEAD.

all doubt could not be excluded, unless the Husband were *extra quatuor maria*. But, as it is obvious that all doubt may be excluded from other circumstances, although the Husband be within the four seas, the modern practice permits the introduction of every species of legal Evidence tending to the same conclusion. But still the Evidence must be of a character to exclude all doubt : and when the Judges, in the *Banbury Case*, spoke of satisfactory Evidence upon this subject, they must be understood to have meant such Evidence as would be satisfactory, having regard to the special nature of the subject. It is to be deduced, as a corollary from the opinions of the learned Judges in that Case, that, whenever a Husband and Wife are proved to have been together, at a time when, in the order of nature, the Husband might have been the Father of an after-born Child, if sexual intercourse did then take place between them, such sexual intercourse was, *prima facie*, to be presumed ; and that it was incumbent upon those who disputed the Legitimacy of the afterborn Child, to disprove the fact of sexual intercourse having taken place, by evidence of circumstances which afford irresistible presumption that it could not have taken place ; and not, by mere evidence of circumstances, which might afford a balance of probabilities against the fact that sexual intercourse did take place. In the present Case, the Husband and Wife are proved to have been together at a time, when, if sexual intercourse did take place between them, the Husband might, in the order of nature, have been the Father of the Plaintiff ; and the circumstances given in evidence on the part of the Defendant, not only do not afford irresistible presumption that sexual intercourse did not actually take place, but leave the balance of probabilities in favour of the fact that sexual intercourse did take place between them. It is true, that

the rule laid down by the learned Judge who tried the Issue, from the Case of *The King v. Luffe*, cannot be reconciled with the opinions of all the Judges in the *Banbury* Case, and is not, therefore, to be considered as the rule now applicable to the subject: yet, as it is my opinion that if upon any direction from that learned Judge, the Jury had found a different Verdict, it would have been my duty to have ordered a new Trial, it cannot serve either the purposes of justice, or the interest of the parties, to submit this Case, a second time, to a Jury, in order to give to the Defendant the chance of their coming to a Verdict, which, if they did find it, I could not adopt.

1823.
—
HEAD
v.
HEAD.

Motion refused.

This Motion was heard on Appeal before the *Lord Chancellor*, and on the 24th April 1823, his Lordship confirmed the decision of the Vice-Chancellor.

BANBURY PEERAGE CASE.

THE following are the questions put to the Judges by the House of Lords in the Case of the *Banbury* claim of Peerage, and the answers returned thereto (a).

1811.
2d, 13th, & 30th
May, and
4th July.

1st. "Whether the presumption of Legitimacy, arising from the birth of a Child during wedlock, the Husband and Wife not being proved to be impotent, and having opportunities of access to each other during the period in which a Child could be begotten

BANBURY
PEERAGE.

(a) These Questions and Answers are extracted from the printed Report of the Proceedings in this Case, belonging to Lincoln's Inn Library.

1811.

BANBURY
PEERAGE.

“ and born in the course of nature, can be rebutted by
“ any circumstances inducing a contrary presumption?”

The *Lord Chief Justice* of the Court of Common Pleas having conferred with his Brethren, stated, that they were unanimously of opinion,

“ That the presumption of Legitimacy arising from
“ the birth of a Child during wedlock, the Husband and
“ Wife not being proved to be impotent, and having
“ opportunities of access to each other, during the
“ period in which a Child could be begotten and born in
“ the course of nature, may be rebutted by circum-
“ stances inducing a contrary presumption;” and gave
his reasons.

2d. “ Whether the fact of the birth of a Child from
“ a Woman united to a Man by lawful wedlock, be
“ always, or be not always, by the law of England, *primâ*
“ *facie* evidence that such a Child is legitimate; and
“ whether in every case in which there is *primâ facie*
“ evidence of any right existing in any Person, the *onus*
“ *probandi* be always, or be not always, upon the Person
“ or Party calling such right in question. Whether such
“ *primâ facie* evidence of Legitimacy may always, or
“ may not always, be lawfully rebutted by satisfactory
“ evidence that such access did not take place between
“ the Husband and Wife, as by the laws of nature is
“ necessary in order for the Man to be, in fact, the
“ Father of the Child; whether the physical fact of
“ impotency, or of non-access, or of non-generating
“ access (as the case may be) may always be lawfully
“ proved, and can only be lawfully proved, by means of
“ such legal evidence as is strictly admissible in every
“ other case in which it is necessary, by the Laws of
“ England, that a physical fact be proved?”

The *Lord Chief Justice* of the Common Pleas delivered the unanimous opinion of the Judges upon this question as follows :

1811.

BANBURY
PEERAGE.

“ That the fact of the birth of a Child from a Woman
“ united to a Man by lawful wedlock, is, generally, by
“ the law of England, *primâ facie* evidence that such
“ Child is legitimate.

“ That in every case in which there is *primâ facie*
“ evidence of any right existing in any Person, the *onus*
“ *probandi* is always upon the Person or Party calling
“ such right in question.

“ That such *primâ facie* evidence of Legitimacy may
“ always be lawfully rebutted by satisfactory evidence
“ that such access did not take place between the Hus-
“ band and the Wife, as, by the laws of nature, is neces-
“ sary in order for the Man to be, in fact, the Father of
“ the Child.

“ That the physical fact of impotency, or of non-
“ access, or of non-generating access, as the case may
“ be, may always be lawfully proved by means of such
“ legal evidence as is strictly admissible in every other
“ case in which it is necessary, by the Law of England,
“ that a physical fact be proved.”

3d. “ Whether evidence may be received and
“ acted upon to bastardize a Child born in wedlock,
“ after proof given of such access of the Husband and
“ Wife, by which, according to the laws of nature, he
“ might be the Father of such Child, the Husband not
“ being impotent, except such proof as goes to negative
“ the fact of generating access?”

1811.

BANEURY
PEERAGE.

4th. "Whether such proof must not be regulated
"by the same principles as are applicable to the legal
"establishment of any other fact?"

In answer to the said questions, the *Lord Chief Justice* of the Common Pleas delivered the unanimous opinion of the Judges on the same, as follows:—

"That, after proof given of such access of the Husband and Wife, by which, according to the laws of nature, he might be the Father of a Child (by which we understand proof of sexual intercourse between them) no evidence can be received except it tend to falsify the proof that such intercourse had taken place."

"That such proof must be regulated by the same principles as are applicable to the establishment of any other fact."

5th. "Whether evidence may be received, and acted upon to bastardize a Child born in wedlock, after proof given of such access of the Husband and Wife, by which, according to the laws of nature, he might be the Father of such Child, the Husband not being impotent, except such proof as goes to negative the fact of generating access?"

6th. "Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact?"

In answer to the said questions, the *Lord Chief Justice* of the Common Pleas delivered the unanimous opinion of the Judges on the same, as follows:—

1811.

BANBURY
PEERAGE.

“ That after proof given of such access of the Husband and Wife, by which, according to the laws of nature, he might be the Father of a Child (by which we understand proof of sexual intercourse between them) no evidence can be received, except it tend to falsify the proof that such intercourse had taken place.”

“ Such proof must be regulated by the same principles as are applicable to the establishment of any other fact.”

7th. “ Whether, in every case where a Child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place, after the Marriage between the Husband and Wife (the Husband not being proved to be separated from her by sentence of Divorce) until the contrary is proved by evidence sufficient to establish the fact of such non-access, as negatives such presumption of sexual intercourse within the period, when, according to the laws of nature, he might be the Father of such Child ?”

8th. “ Whether the legitimacy of a Child born in lawful wedlock (the Husband not being proved to be separated from his Wife, by sentence of Divorce), can be legally resisted by the proof of any other facts or circumstances than such as are sufficient to establish the fact of non-access, during the period within which the Husband, by the laws of nature, might be the Father of such Child ; and whether any other question but such non-access can legally be left to a Jury upon any Trial, in Courts of Law, to repel the presumption of the legitimacy of a Child so circumstanced ?”

1811.

BANBURY
PEBRAGE.

Then the Judges being agreed in their opinion, in answer to the said questions propounded to them, the *Lord Chief Justice* of the Court of Common Pleas delivered their unanimous opinion upon the same, as follows :—

“ That in every case where a Child is born in lawful wedlock, the Husband not being separated from his Wife by a sentence of Divorce, sexual intercourse is presumed to have taken place between the Husband and Wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse, did not take place at any time, when, by such intercourse, the Husband could, according to the laws of nature be the Father of such Child.

“ That the presumption of the legitimacy of a Child born in lawful wedlock, the Husband not being separated from his Wife by a sentence of Divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the Husband and Wife, at any time, when, by such intercourse, the Husband could, by the laws of nature, be the Father of such Child. Where the legitimacy of a Child, in such a case, is disputed, on the ground that the Husband was not the Father of such Child, the question to be left to the Jury is, whether the Husband was the Father of such Child? and the evidence to prove that he was not the Father, must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a Jury, that no sexual intercourse took place between the Husband and Wife at any

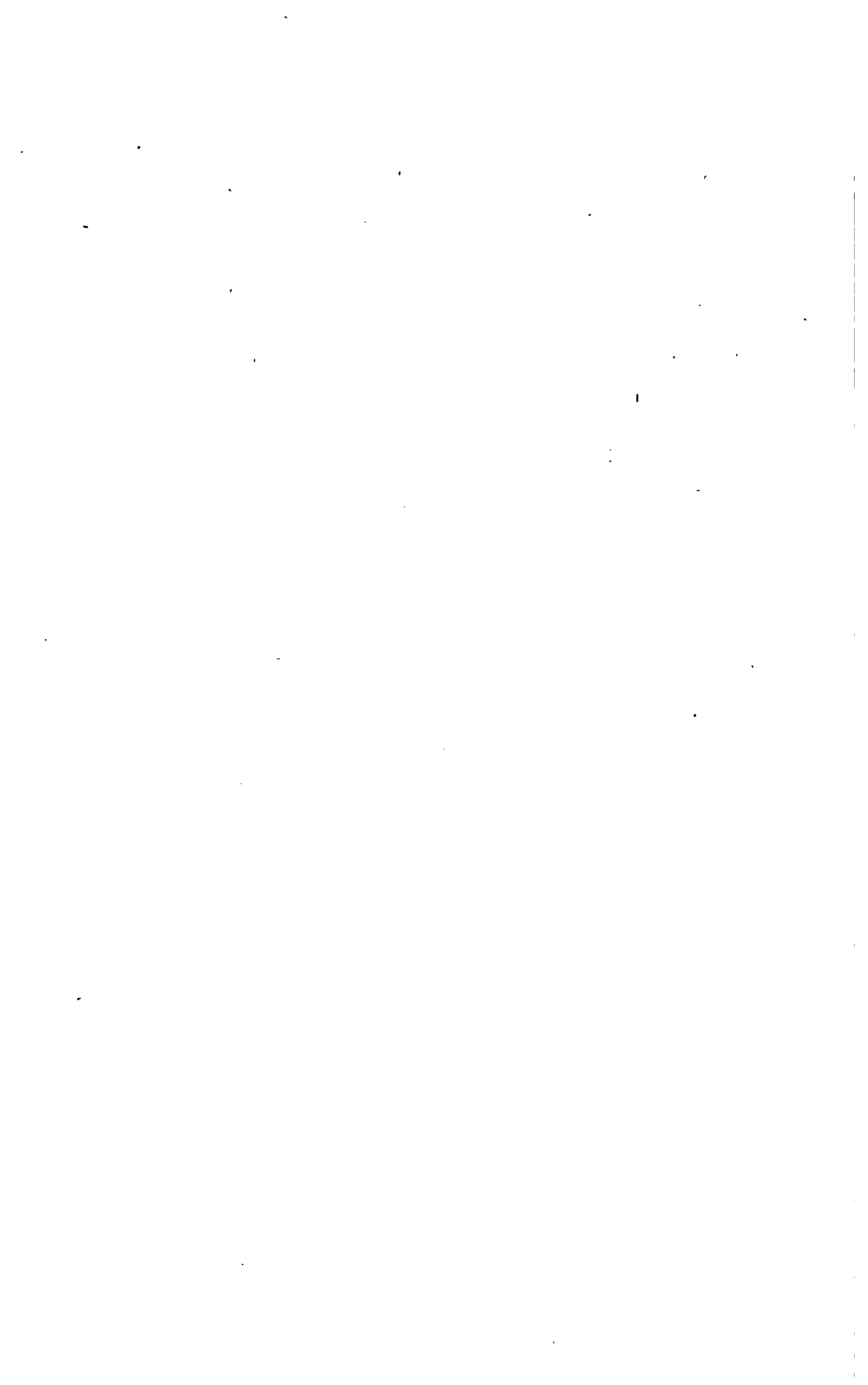
“ time, when, by such intercourse, the Husband could,
“ by the Laws of Nature, be the Father of such Child.”

1811.

BANBURY
PEERAGE.

“ The non-existence of sexual intercourse is generally
“ expressed by the words ‘ non-access of the Husband
“ to the Wife ;’ and we understand those expressions as
“ applied to the present question, as meaning the same
“ thing, because in one sense of the word ‘ access,’ the
“ Husband may be said to have access to his Wife as
“ being in the same Place or the same House ; and yet,
“ under such circumstances, as instead of proving, tend
“ to disprove, that any sexual intercourse took place
“ between them.”

END OF PART I.



CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

JACKSON v. HAWORTH.

1823.
31st January.

JOHN Haworth and *Sarah* his Wife were the Defendants in this Cause. *John Haworth* entered an Appearance for himself and his Wife; and, early in Michaelmas Term last, obtained the Common Order for Six Weeks time for himself and his Wife to answer, as in a Country Cause:

Practice.
Baron and Feme.

Afterwards an Order was obtained, on behalf of the Wife, as of course, that she might have leave to answer separately; it being alleged that she and her Husband lived separate from each other, and that the Property in question in this Cause was vested in him in her right.

Husband and Wife being Defendants, the latter, after obtaining an Order to answer separately, is entitled to all the Orders for time to answer, and is not bound by any previous Order obtained by her Husband for that purpose on behalf of himself and her.

On the 13th January 1823, Mrs. *Haworth*, who lived at *Wanstead*, in *Essex*, obtained, as of course, the usual Order for a Month's time to answer, as in a Town Cause.

VOL. I.

M

1823.

JACKSON

v.

HAWORTH.

The Court was now moved, on behalf of the Plaintiff, to discharge this last Order, for irregularity.

Mr. *Treslove* for the Motion :—

Where a Person institutes a Suit against a Husband and Wife, he cannot serve the Wife separately. Where an Order for Time is obtained by Husband and Wife, how can the Plaintiff know whether it is obtained by the act of the Husband, or of the Wife? If the Wife had notice of the Suit at the time when the first Order for Time on behalf of herself and her Husband was obtained, it is quite unreasonable that she should be allowed, as of course, to obtain a new Order for Time, after having the advantage of the first. If she can be at all entitled to such new Order, it must be on making out a Special Case to the Court, and showing some sufficient reason for such an indulgence. An Order of course for that purpose cannot be regular.

The VICE-CHANCELLOR :—

No authority is advanced in support of this Application. The Wife became a substantial Party to the Suit, only from the time of the Order that she should answer separately. From that time I think she was entitled to the same time as the other Defendants, and the Register (Mr. *Walker*) tells me he is of the same opinion.

Motion refused, with Costs.

GAREY v. WHITTINGHAM.

1822.
23d January.

Practice.
Baron and Feme.

IN this Cause *Whittingham* and his Wife were Defendants. The Husband put in a separate Answer, in which he stated that his Wife did not live with him, and that he had no influence over her. The Wife put in no Answer; and an Attachment was sued out against the Husband for want of his Wife's Answer, under which he was taken into custody.

The Court was now moved, on his behalf, to discharge this Attachment, and that the Plaintiff might have leave to sue out an Attachment against the Wife.

Mr. *Belt*, for the Motion, read that passage in the Answer, which stated that the Husband did not live with the Wife, and had no influence over her.

The VICE-CHANCELLOR:—

A Wife can never answer separately, unless an Order is obtained for that purpose. A Husband may obtain that Order where he cannot influence his Wife to answer; and where the Husband is abroad, and not amenable to the jurisdiction, the Plaintiff may obtain the Order. But I doubt whether, in either Case, Notice of the Application ought not to be given to the Wife. I likewise doubt whether the Husband can answer separately, before there is an Order that the Wife shall put in a separate Answer. The practice, however, seems to be to receive his Answer. And yet, if it were not a Case in which an Order might be obtained for the Wife

Husband and Wife being Defendants, the Husband, without obtaining an Order for the Wife to answer separately, puts in a separate Answer, stating that his Wife did not live with him, and that he had no influence over her; and being taken into custody on an Attachment, for want of his Wife's Answer, the Court ordered him to be discharged, and the Wife to answer separately, and indemnify her Husband in respect of Costs.

Where Husband and Wife are Defendants, and the Husband is abroad, the Plaintiff may obtain an Order that the Wife shall answer separately.

Quære, Whether either the Plaintiff or the Husband can obtain this Order, without Notice to the Wife; and whether the Husband can put in a separate Answer, before any such Order is made.

1823.

GAREY
v.
WHITTINGHAM.

to answer separately, she must answer jointly; and then his Answer must be taken off the File, in order that she may join in it. His separate Answer will be put in only where the Wife will not, in fact, join; and the receiving of his Answer before he obtains the Order upon his Wife, does, in truth, forward the proceedings.

I shall order the Husband, in the present Case, to be discharged, and the Wife to answer separately, and to indemnify the Husband in respect of Costs.

1823.
7th February.

Practice.
Baron and Feme.

BUSHELL v. BUSHELL.

Husband and Wife being Defendants, and the Husband being abroad, the Wife alone was served with the Subpœna, and an Attachment was directed against her for want of Appearance.

IN this Case, *Bagshaw* and *Nancy* his Wife, were Defendants. *Bagshaw* was abroad; but his Wife resided within the Jurisdiction of the Court. The Subpœna against her and her Husband was served upon her; but no Appearance was entered.

The Court was now moved, on behalf of the Plaintiff, that an Attachment might issue against the Wife for want of an Appearance. It did not appear that Notice of the Motion was served on the Wife.

Mr. *Wingfield*, for the Motion, relied on *Bell v. Hyde (a)*, and *Barry v. Cane (b)*.

The VICE-CHANCELLOR:—

I doubt whether there ought not to be Notice of this Motion. I shall, however, order the Attachment, without prejudice to an application to discharge it, the Plaintiff undertaking not to execute it, without the leave of the Court.

(a) Pre. Cha. 328.

(b) 3 Madd. 472.

WORTHINGTON v. EVANS.

1823.
28th January.

*Legacy.
Condition.*

THE Bill in this Cause prayed for a Declaration, that the Plaintiff had become entitled to certain Personal Property bequeathed to him by his Father, upon condition that he married with the Consent in Writing of the Executors.

Thomas Worthington, the Father, by his Will made in November 1805, after giving 3,000*l.* to be divided by his Executors equally among all the Children of his three Daughters, gave to his Executors, *David Evans* and *Edward Heyward*, their Executors, Administrators, and Assigns, his Household Goods and other Personal Estate therein mentioned, and also all the Residue of his Personal Estate after payment of his Debts, upon Trust, for the Use and Benefit of his Son, (the Plaintiff), to be paid and transferred to him, as soon as conveniently might be after his Marriage, with the Interest and Produce to accrue and arise in the meantime, upon condition, nevertheless, that such Marriage should be with the Consent of his, the Testator's, Trustees, or the Survivor of them, first had and obtained in Writing, under his or their hand or hands. And, after directing his Trustees to cause an Inventory and Appraisement to be made, and authorizing them to permit the Plaintiff to continue in Possession of a certain Farm till his Marriage, but if the Plaintiff should marry without the Consent of the Trustees, or the Survivor of them, first had and obtained in Writing, as before mentioned, or in case he should, with or without their Consent,

Where a Legacy was given on condition of the Legatee marrying with the Consent in Writing of the Executors, and he afterwards married with their Approbation, but they did not express their Consent in the manner required by the Will: Held, that the Legatee was entitled to his Legacy, and that the Consent of one of the Executors who had not acted was not necessary.

1823.
WORTHINGTON
v.
EVANS.

marry *J. P.* or any of the Daughters of *T. P.* then that the Plaintiff should not be entitled to any part of the Household Goods, Property or Effects before bequeathed for his Benefit; and he directed the Trustees, or the Survivor of them, to pay the Sum arising from the Appraisement, and all the Residue of his Personal Property, among all the Children of his three Daughters, in equal Shares; and appointed *David Evans* and *Edward Heyward*, Executors of his Will.

The Testator died in 1806. *David Evans* alone proved the Will, and alone acted in the execution of the Trusts; the other Executor and Trustee, *Mr. Heyward*, refused to act, in any manner, in the Trusts of the Will. Soon after the Testator's death, the Plaintiff formed an attachment to a Lady, whom he afterwards married, and who was not of the Family prohibited by the Testator. This attachment was formed, and a Treaty of Marriage entered into, with the Approbation of *Mr. Evans*, the acting Executor and Trustee. A short time before the Marriage, the Plaintiff applied for the Consent both of *Evans* and *Heyward*; and the Solicitor of the former, prepared an Instrument, in the form of a Deed-poll, to be executed by both the Executors, reciting the Clause in the Will, and the intended Marriage, and expressing a formal Consent to it.

This Instrument was duly executed by *Mr. Evans*; but *Mr. Heyward*, though he expressed his perfect Consent to the Marriage, declined to execute the Instrument, lest he should thereby be considered as taking upon himself the Trusts of the Will. On the day preceding the one which was fixed for the Marriage, the Plaintiff wrote the following letter to *Mr. Evans*:—"Dear Sir, Fearful it should have slipped your memory, I have taken the

liberty of reminding you, that it is still my intention to be married to-morrow, when I expect to see you here, and call on Mr. *Heyward* on your road, as he has promised me at as early an hour as you may think proper,"

1893.

 WORTHINGTON
 v.
 EVANS.

On the same day, Mr. *Evans* wrote in reply to the Plaintiff, as follows:—"Dear Sir, You should have told me, when I had the pleasure of seeing you here, that it was your intention to have been married to-morrow; but you did not give me a hint that it was your intention so soon. If you had, I should have been better prepared. And I hope it will make no material difference, if the ceremony is delayed a day longer. I will, however, be as early to-morrow morning as I possibly can at Mr. *Heyward's*, and bring with me the proper Consent, done right, to your house, which will be some time doing."

"N. B. I should have sent your servant home sooner, but I waited for Mr. *Thomas*, who was from home. But you know you have my Consent to marry your Cousin *Sarah Worthington*."

Mr. *Thomas*, was the Solicitor employed by Mr. *Evans* to prepare the Instrument. Early in the morning of the day on which these letters were written, Mr. *Evans* called on Mr. *Heyward*, and produced to him the Instrument in question, which *Heyward* read, but which he declined to sign, on the ground that it might be considered as done in execution of the Trusts of the Will, in which he refused to act. Mr. *Evans* then signed the Instrument himself, and proceeded to the house of the Plaintiff, where he found that the Marriage had taken place, in the morning, some hours before his arrival, and before the time when he signed the Instrument.

1823.

WORTHINGTON
v.
EVANS.

Evans, in his Answer, admitted that the Marriage was, in fact, had with his Consent; and stated, that he would have signed the Instrument in question before the time when he did sign it, if he had thought that the Marriage would have taken place so soon.

Heyward's Answer stated, that, upon having the Instrument read over, he conceived a doubt whether he could safely execute any Instrument relative to the Trusts of the Will, without involving himself in the execution of them, and that he wished to consult his Attorney upon the subject, and, for that reason, declined to sign the Paper at that time. But he added that, in all other respects, except in the apprehension that by signing he might implicate himself in the Trusts of the Will, he most fully approved of the Paper Writing; and that he would, had he considered himself as an acting Trustee, have signed that Paper, or any other, which might have been thought necessary to testify his Consent to the Marriage.

The other Defendants were the Children of the Testator's Sisters, who claimed under the Gift over of the Property made by the Will, in case the Plaintiff married without the Consent of the Trustees.

The Cause now came on to be heard.

Mr. *Bell* and Mr. *Roupell*, for the Plaintiff:—

I. It is settled that cases of this kind are to receive a favourable construction as to the performance of the Condition; and that a Consent substantially given, though in some respect deficient in form, will be considered a sufficient compliance to prevent a Forfeiture. *D' Aguilar v. Drinkwater* (a), *Daley v. Desbouverie* (b).

(a) 2 V. & B. 225.

(b) 2 Atk. 261.

1823.

WORTHINGTON
v.
EVANS.

II. The Consent which was given is sufficient, and is more perfect than in many cases where the Court has held conditions of this kind to have been complied with. In *Daley v. Desbouverie*, the words "we shall be obliged to consent" if certain acts were done, were held by Lord *Hardwicke*, to amount to an actual present Consent. In *D'Aguilar v. Drinkwater*, the expression "that the Party would never stand in the way of any arrangement which the other Executors might approve," was construed to be a valid Consent. *Pollock v. Croft (c)*, *Merry v. Ryoes (d)*, *Mesgrett v. Mesgrett (e)*, Lord *Strange v. Smith (f)*, *Burleton v. Humphries (g)*, are all Cases to the same effect. It is settled, by these Authorities, that a Consent substantially given is sufficient to satisfy a Clause of the kind now in question; and that the Conduct of the Trustee may be such as to amount to Consent. In the present Case, all was done that the Testator could have wished. Even *Heyward* did not refuse his Consent in Writing, but only wished to consult his Attorney, because he was afraid it might be considered as taking upon himself the execution of the Trusts of the Will, which he declined.

III. The Consent is not required from a Person not acting as Executor or Trustee, but is annexed entirely to the Office; therefore, the Consent of *Heyward*, who refused to act in the Trusts of the Will, is quite immaterial. In every clause of the Will, where the Consent is mentioned, it is not the Consent of the Persons *by name* which is required, but the Consent of "his said Trustees." Why then is it necessary to have the Consent of one who refuses to be a Trustee? The Testator has made the act of Consent a part of the Trusts of his Will.

(c) 1 Meriv. 181. (d) 1 Eden, 1. (e) 2 Vern. 580.
(f) Amb. 263. (g) Amb. 256.

1822
 WORTHINGTON
 v.
 EVANS.

How could a Trustee transfer the Property to the Plaintiff upon his Marriage with Consent, according to the Trusts of the Will, when he actually renounced the Will? In such a Case it could not be required. His renouncing made his Consent unnecessary. The only Trustee who acted gave his Consent in sufficient Terms; for, in his Letter of the 3d of November, he says, "I shall be as early To-morrow as I possibly can with Mr. Heyward, and bring the proper Consent with me in Writing;" and afterwards he adds, "You know you have my Consent to marry your Cousin, Sarah Worthington." These expressions are an actual Consent in Writing. But even if the Consent is to be considered as a matter of personal discretion in the Trustees, independent of their Office, the circumstance of one of the Trustees never having acted, brings the Case within what is said by Lord Eldon in *Clarke v. Parker* (h). "It is said, *Parker* never acted; and if that were so, I should have been strongly disposed to say there is, though no execution of a previous Settlement, such a Consent on the part of the Two acting Trustees as would be sufficient to satisfy the Clause in the Will."

IV. This is a Case of personal Estate, and is therefore one in which the Clause is not to be construed so strictly as if it were realty. *Long v. Dennis* (i).

Mr. Heald, Mr. Twiss, and Mr. Robert Roupell, for Defendants:—

I. As to the Authorities which have been cited, they do not sufficiently apply to the present Case, and some of them are met by *Lloyd v. Branton* (k).

(h) 19 Ves. 16. (i) 4 Burr. 2054. (k) 3 Meriv. 108.

II. Even if it were admitted that the Consent of *Boans* alone was required, that Consent was not sufficiently given. The Postscript to his Letter shows that he did not consider that Letter as giving his Consent. The words, "I should have been better prepared," mean that he would have taken into consideration all the circumstances of the Lady's Fortune, and would have consulted the other Trustee. It shows that the act of Consent was only inchoate and incomplete. It is laid down in *Reynish v. Martin (l)*, that a Consent given subsequently to the Marriage is not sufficient.

1823.
WORTHINGTON
v.
EVANS.

III. As to the argument that the power to consent is annexed merely to the Office of Trustee, the opinion expressed by the late Master of the Rolls in *Knight v. Cameron (m)*, seems against that construction. And, in a recent Case before the *Lord Chancellor*, where a question arose as to Leases which were required to be executed by Guardians, the *Lord Chancellor* expressed an opinion that both must concur, and that the act of one was not sufficient. It must be admitted that there is no distinction, in the expression of the Will, between the authority given to the Trustees to consent to the Marriage, and the other authorities given to them by the Will; except only that the Consent is required to be in Writing. But there is no authority for the doctrine that, where a Testator reposes a discretion in Trustees as to a Marriage, the Consent of one Trustee shall be sufficient. The Testator not requiring the Consent of the Trustees by name, but merely by the description of his Trustees, is not sufficient to show that the authority was annexed exclusively to their Office. The Testator was reposing a confidence in these Trustees, as being persons with whose judgment he was satisfied. If

(l) 3 Atk. 330.

(m) 14 Ves. 392.

1823.

WORTHINGTON
v.
EVANS.

Evans had died and *Heyward* had become the Survivor, his Consent would have become indispensably necessary, not from the language of the Will, but from the necessity of the case. The Testator, by using the word "Survivor," favours the construction, that the authority was not annexed merely to the Office; for, if he had meant it to be exercised by one only, in case he alone took upon himself the Office, he never would have used the word "Survivor," which has the effect of giving it to one who may not have assumed the office at all.

IV. The Letter, which is relied on in this Case as giving the Consent, is not such as in the Case of *Daley v. Desbouverie*, which made the Court say that it had the effect of inducing the Parties to marry, and that it would, therefore, be a fraud to allow the Party afterwards to depart from the effect of such a Letter.

The VICE-CHANCELLOR:—

I am prepared to hold, according to the intimation of Lord *Eldon's* Opinion, in *Clarke v. Parker*, that the Authority to Consent is here annexed to the office of Trustee; and, like other Authorities annexed to that Office, vested in the single Trustee who acted. The Letter written by the acting Trustee the day before the Marriage, must be considered as a sufficient Consent in Writing. And if there had not been such a Letter, inasmuch as the formal Consent in Writing would have been executed by him but for the accidental delay occasioned by the other Trustee, and not from any change of purpose, the Court would have considered his Consent to have been substantially given, according to the Will; because he had expressed his full Approbation of the Marriage, and only did not sign it, for a reason personal to himself.

I do not, however, decide the Case; because the fact that the other Trustee named had never acted and had refused to sign only for the reason stated, though satisfactorily proved, is not sufficiently put in issue by the Bill; and I must send it to the *Master* to inquire into these Facts.

1823.

WORTHINGTON
v.
EVANS.

The *Master* reported, that the late Defendant *E. Heyward* never acted in the Trusts of the Will; and that he refused to sign the written Consent, tendered to him in the Morning before the Marriage was celebrated, because he imagined, that, by signing such Consent, he should be committing himself to act as Trustee, and that he, as well as the acting Trustee, approved of the Marriage.

24th March.

Upon this Report, his *Honor* made a Decree in favour of the Plaintiffs, saying, that he did so for the reasons which he had stated when the Cause was heard.

30th April.

1822.
2d November.

1823.
31st January.

*Specific
Performance.*

Where Damages in an Action at Law for breach of a Contract to sell a Chattel, would be an insufficient remedy for the Purchaser, although a sufficient remedy for the Vendor, a Demurrer to a Bill by the Vendor for a specific Performance was over-ruled, because the remedy in this Court must be mutual for Purchaser and Vendor.

Where the Answer to a Bill for a specific Performance raises any other Objection to the performance of the Contract besides Defects in the Title, on a Motion for a reference of the Title to the Master, after the Answer has come in: *semble*, that the Court will not examine whether the other Objections be frivolous or not, because that is matter to be decided at the hearing of the Cause.

WITHY v. COTTLE.

THIS was a Bill filed by the Vendor of an Annuity, payable out of the Dividends of Stock, standing in the name of the Accountant-General of this Court, for the specific performance of an Agreement for the purchase of this Annuity.

The Defendant demurred to the Bill.

Mr. Hart and Mr. Stuart for the Demurrer :—

I. It is settled, that this Court will not entertain a Bill for the specific performance of an Agreement for the Sale or Transfer of Stock, *Cudd v. Rutter (a)*, *Nutbrown v. Thornton (b)*. In the present Case, the Contract is for the Sale of the Dividends of Stock; and it must, therefore, be governed by the same Principle which guides the Court in refusing specific performance of an Agreement for the Sale of the Stock itself.

II. This is not a Case within any of the exceptions to the general rule, that the Court will not entertain a Bill for the specific performance of a Contract for the Purchase of a Chattel, *Burton v. Lister (c)*, *Taylor v. Neville (d)*. All the Cases of exception from the general rule, proceed on the principle, that Damages to be recovered in an Action at Law, would not, owing to some particular circumstances in the Case, afford an adequate remedy.

besides Defects in the Title, on a Motion for a reference of the Title to the Master, after the Answer has come in: *semble*, that the Court will not examine whether the other Objections be frivolous or not, because that is matter to be decided at the hearing of the Cause.

(a) 1 P. W. 570. (b) 10 Ves. 159. (c) 3 Atk. 383.
(d) 3 Atk. 384. mentioned in *Burton v. Lister*.

1863.

WITNEY
v.
COTTELL.

In *Wright v. Bell* (c), specific performance of a Contract to purchase a Debt, was decreed by the Court of Exchequer, on the ground that the Agreement was not in such a shape as could enable the Party to recover Damages in an Action at Law. In the present Case, there can be no doubt that, in an Action at Law by the Vendor, he could obtain a sufficient Compensation in the shape of Damages. Here there is nothing in the nature of the Property or in the nature of the Agreement, to bring the Case within the exceptions to the general rule, that an Action at Law is a sufficient remedy for the Breach of such a Contract.

Mr. Sugden and Mr. Seton for the Bill, were stopped by the Court.

The VICE-CHANCELLOR:—

There can be no doubt that the Defendant, who is the Purchaser of this Annuity, might have filed a Bill for the specific performance of the Agreement for Sale to him; because a Court of Law could not give him the subject of his Contract, and the remedy here must be mutual for Purchaser and Vendor.

Demurrer overruled.

The Defendant afterwards put in his Answer, insisting that the Plaintiff could not make a good Title to the Annuity, and objecting that, as the Plaintiff had not made out a good Title by the Time fixed in the Conditions of Sale for the completion of the Contract, the Defendant could not now be called upon for a specific Performance.

(c) 5 Price, 325. and S. C. Daniell's Exch. Reports, 95.

1823.

WITHY
v.
COTTE.

This Answer being filed, the Plaintiff moved for a reference to the *Master* to inquire, and state to the Court whether the Plaintiff could make a good Title to the Annuity, and at what time he could make such Title.

Mr. Sugden and Mr. Seton, for the Motion :—

The only other objection raised by the Defendant, besides the Question of Title, is the non-performance of the Contract within the time fixed by the Conditions of Sale. That objection is quite frivolous. There can be no pretence to say that Time is of the Essence of the Contract, in such a Case as this. That objection being of no avail, nothing but the Question of Title remains, and the Case comes within the principle of those in which the Court, at this stage of the Cause, directs a reference to the *Master* to report upon the Title. The Case comes exactly within the principle of *Boehm v. Wood* (f), which decided, that the Court will grant a reference as to the Title, where the only other objection raised by the Answer is of a nature that cannot be sustained. In *Boehm v. Wood*, as in this Case, the only other objection raised was, that Time was of the Essence of the Contract; and the Court, on looking into the Answer, found that the Case was not one in which that objection could be sustained, and therefore directed a reference.

Mr. Hart and Mr. Stuart opposed the Motion :—
I. The Court cannot, at this stage of the Cause, enter into the consideration of any objection raised by the Answer besides the Question of Title. Whatever may be said of the decision in *Boehm v. Wood*, it is contradicted by all the preceding Cases in which this Question

(f) 1 Ja. & Wa. 419.

has been considered. In *Blyth v. Elmhurst* (g), Lord Eldon himself lays it down as the settled doctrine of the Court, that, if the Answer, upon reasons solid or frivolous, insists that the Agreement ought not to be executed, the Court cannot direct a reference as to the Title on an interlocutory Application, unless by consent of the Defendant. This is the true doctrine, recognized by the principle of all the Cases on this subject. The contrary doctrine cannot be maintained, because it supposes that the Court, by merely looking into the Answer, can decide upon the force of an objection which may be materially affected by Evidence to be taken in the Cause. Till the hearing, the Court has not the proper means of forming an opinion as to whether the objection is or is not frivolous.

1853.
WITNEY
v.
COTTELL.

II. In this Case, the objection that Time is of the Essence of the Contract, is certainly not frivolous, the subject-matter of the Contract being a Life Annuity; the value of which must necessarily be diminished by effluxion of time. It is therefore precisely the Case in which Time must be of the Essence of the Contract.

The VICE-CHANCELLOR:—

I feel myself extremely embarrassed by the contradictory authorities which have been cited on this Motion. There is great difficulty in the doctrine that the Court can, upon Motion, decide on the merits of an objection raised by the Answer. But as there appears to be an express authority in support of it, I would wish this Motion to be made before the Lord Chancellor, rather than that I should decide between these conflicting Cases.

(g) 1 V. & B. 1.

1843.

WITNEY
v.
COTTEZ.

The Motion was accordingly made before the *Lord Chancellor*, when his Lordship, on reading the Answer, expressed his opinion, that the objection as to Time being of the Essence of the Contract, was not frivolous; and refused the Motion, without Costs.

In the following Case the same question occurred.

1843.
25th April.

Specific Performance

Scmble, That the Court will not, on Motion, decide upon the validity of any other Objection, besides defect of Title, which may be raised by the Answer to a Bill for Specific Performance, the consideration of any other Objection being matter to be reserved till the hearing of the Cause.

GORDON v. BALL.

THIS was a Bill filed by the Vendor, for the specific performance of a Contract for the purchase of an Estate. The Defendant put in his Answer, insisting, that the Plaintiff could not make a good Title to the Estate, and that he ought not to be called upon for a specific Performance, because there was a right of way adross the Estate, the existence of which had been concealed from him, and which, if he had known of it, would have deterred him from purchasing.

The Plaintiff now moved, that it might be referred to the *Master*, to inquire whether the Plaintiff could make a good Title to the Estate, and at what time.

Mr. Hart for the Motion, referred to *Boehm v. Wood* (a), and *Withy v. Cottle* (b), in which last Case the *Lord Chancellor*, though he refused the motion for a reference as to the Title, confirmed the doctrine laid down in *Boehm v. Wood*, that when any other objection to the performance of the Contract, besides defect of Title, is raised by the Answer, the Court will consider whether that other objection be substantial or not. In

(a) 1 Jac. & Walker, 419. (b) The preceding Case.

the present Case, the objection is by no means substantial. The footpath in question is a subject for compensation, and for compensation to a very trifling amount.

1843.

GORDON
v.
BAILL

Mr. *Roswell* opposed the Motion, and relied on the established rule; that no reference of the Title can be directed on Motion, where any other objection is raised by the Answer.

THE VICE-CHANCELLOR:—

The admitted rule is, that if any other objection besides the question of Title is raised by the Answer, the order of reference as to the Title cannot be made upon Motion. It is stated that this rule admits of exceptions, where the other objection is unsubstantial. But the consideration, whether an objection is to be considered unsubstantial, involves great difficulty. In order to determine whether the other objection be or not unsubstantial, it must, for the purpose of this Motion, be taken to be founded in fact; and being to be considered by the Court, it is difficult to say that it is not to be open to the argument of Counsel. If the objection is to be considered as unsubstantial whenever the Court is of opinion that it cannot be supported, then the whole merit of a Cause may come to be argued and to be decided upon Motion, instead of Decree, and upon an assumed statement which may have no existence in point of fact. If the objection may, in the opinion of the Court, be invalid, and yet is not to be considered as unsubstantial, then the Case becomes still more embarrassing, and neither the Court nor the Counsel can know very well how to treat it. Is the Court to say the invalidity of the other objection is too clear for argument, and therefore it is unsubstantial?—Then the Ques-

1823.

GORDON

v.
BALL.

tion of substantial or unsubstantial comes to depend upon the constitution of mind of the particular Judge.

At the same time it must be admitted, that there may be Cases in which the other objection is of such little weight, that there may be reason to consider it as stated for the purpose of delay, and in order to escape an immediate reference as to the Title. But this immediate reference being in its nature an extraordinary indulgence to the Plaintiff, out of the common course of proceeding, the consideration is, whether it is not better where the Defendant states even a frivolous objection (which it is to be remembered must, as to the facts, be always made upon his oath, and as to the law, be sanctioned by the signature of Counsel) rather to compel the Plaintiffs to adhere to the common course of proceeding, than to encounter the difficulties which must unavoidably arise from a different course.

In this case, however, I am not involved in the difficulties to which I have referred. The Defendant says, not merely that there is a footpath, but that he entered into the Contract upon an express representation by the Plaintiff, that there was no footpath; and this at all events is a substantial objection.

I must therefore refuse the Motion, with Costs.

CASES IN CHANCERY.

181

TROWER v. BUTTS.

1843:
28th January.
1st February.

*Posthumous
Child. Legacy.*

THE supplemental Bill in this cause, was filed for the purpose of obtaining the opinion of the Court as to whether the Defendant, *Thomas Nowell Trower*, who was born a few months after the death of the Testatrix, *Mary Smith*, was or was not entitled to claim under her Will.

Mary Smith, by her Will, dated the 2d of April 1821, bequeathed to Trustees the sum of 2,000*l.* upon Trust to invest the same in the purchase of Stock, and to pay the Dividends thereof, to *Maria Heathcote* for life, and, after her decease, to stand possessed of the capital, in Trust, for all the children of *Robert Trower*, the Nephew of the Testatrix, born in her life-time, equally to be divided between them, share and share alike, to be paid or transferred to them respectively, on attaining the age of twenty-one years; but in case of the death of any of them in her life-time, or under that age, without leaving lawful Issue, then she directed, that the share, as well original as accruing, of each such Child so dying, should go to the others or other of such Children: Provided always, that in case of the death of any of such last-mentioned Children in her life-time, or under the age of twenty-one years, leaving lawful Issue, then such Issue should be entitled to such share or shares of the Trust Fund, as their respective Parents would otherwise have acquired, either originally or by way of accruer, under the Trust aforesaid.

Bequest in Trust for all the Children of the Testatrix's Nephew R., born in the Life-time of the Testatrix, includes a Child of which the Wife of R. was enccinte at the time of the Testatrix's death, though not born for several months afterwards.

The Testatrix died in October 1821.—*Charlotte*, the Wife of her Nephew, *Robert Trower*, had several Children

1823.

TROWER
v.
BUTTS.

born at the time of her death, and was then *enceinte*. In the month of February following, the Defendant, *Thomas Nowell Trower* was born; and the only Question argued at the hearing of the Cause was, whether *Thomas Nowell Trower* was entitled, under the Will, to a share of the 2,000*l.*

Mr. *Wingfield* and Mr. *Lomar* for the Plaintiff, insisted, that the words of the Will required, that all the Children entitled under it, should be *born* in the life-time of the Testatrix, and that, therefore, a Child not born for several months after that event, could not be entitled. If the word in the Will had been "living," there might have been some ground for the question now raised; but there was no authority strong enough to support a claim against the plain meaning of the words of the Will.

Mr. *Skirrow* for the Defendant, *Thomas Nowell Trower*:—

In *Whitelock v. Heddon (a)*, the Devise was, to any Son of *John Whitelock*, begotten and born in lawful matrimony, at the time of *John Heddon* attaining the age of twenty-one years; and it was held unanimously, in that Case, that a Son born three months after the time when *John Heddon* attained twenty-one, was entitled under that Devise. In *Doe v. Clarke (b)*, under a Devise to such children of *B.* as shall be living at the time of his decease, it was held, that a posthumous Child was entitled. *Gibson v. Gibson (c)*, is also a very strong Case, for it was there held, that where a man had given a bond for 900*l.* to be paid to his Daughter, in case he should have no Son living at the time of his decease,

(a) 1 Bos. & Pul. 243.

(c) 2 Freem. 223.

(b) 2 H. Bla. 399.

1823.

TRAVER
v.
BUTTS.

and died, leaving his Wife *enceinte* of a Son, the Daughter should not be entitled, because the Court adopted the maxim of the Civil Law, "*posthumus pro nato habetur.*" In *Burdet v. Hopegood* (d), a posthumous Son was held entitled to real Estate, which was devised, in case the Testator should *leave no Son at the time of his death.* In *Millar v. Turner* (e), Lord *Hardwicke* said, that a posthumous Child, in all matters relating to its advantage, must be considered as *in esse*, according to the rule of the Civil Law. In *Wallis v. Hodson* (f), the same Judge says, that a child *in ventre sa mere*, both by the rules of the Common and the Civil Law, is, to all intents and purposes, a Child, as much as if born in the Father's life-time, and that, according to the Civil Law, a Child in the Mother's womb is considered as absolutely born for all purposes for its own benefit. In *Lancashire v. Lancashire* (g), all the Judges of the Court of King's Bench held the same doctrine to be good Law. *Swinburne*, in his Treatise on Wills, part 4, sec. 15, pl. 14, says, "howsoever the rule be, that he is not said to die without Issue, whose Wife is with child at his death, yet that rule ought to take place, when it tendeth to the benefit of the child, not when it tendeth to the prejudice of the Child, or only benefit of another." All these cases were reviewed in *Thellusson v. Woodford* (h). Mr. *Mansfield*, indeed, says, in his Argument in that Case, that it is only as between Parent and Child, where there is a moral obligation to provide for the Child, that it has been held that a Child *in ventre sa mere* is to be considered as born. But in *Doe v. Clarke*, it was not a Question as between Parent and Child.

(d) 1 P. W. 486.

(f) 2 Atk. 116.

(h) 4 Ves. 238.

(e) 1 Ves. 85.

(g) 5 T. R. 40.

1823.

TROWER
v.
BURR.Mr. *Wingfield*, in reply :—

All the Cases cited, go no further, than that a Child *in ventre sa mere*, at the time of the Father's death, is to be considered as living at that time. But, to consider such a Child, as answering the description of a Child, actually *born*, is going beyond all the authorities.

The VICE-CHANCELLOR :—

It is now fully settled, that a child *in ventre sa mere* is within the intention of a gift to Children *living* at the death of a Testator; not because such a Child, (and especially in the early stages of conception) can strictly be considered as answering the description of a Child living; but because the potential existence of such a Child places it plainly within the reason and motive of the Gift.

In the Case of *Whitelock v. Hodgson*, the words were "Sons begotten and born;" and the difference between the expression "living at the death" and "born in the life-time," was not even hinted at in the Argument or the Judgment; and a Child *in ventre sa mere* was there held to take. In *Lancashire v. Lancashire*, a Child *in ventre sa mere* was considered as born, so as to satisfy the rule of presumption of revocation of a Will from subsequent marriage and birth of a Child. In that Case one of the Judges referred to a maxim of the Civil Law, that, when the birth of a Child happens after the death of a Parent, it is, by fiction of Law, referred back to his life-time.

Upon the whole, I am of opinion, that inasmuch as it is adopted as a rule of construction, that a Child *in ventre sa mere* is within the intention of a Gift to Children living at the death of a Testator, because plainly

within the reason and motive of the Gift; so a Child *in ventre sa mere* is to be considered within the intention of a Gift to Children born in the life-time of a Testator, because it is equally within the reason and motive of the Gift.

1823.

TROWER

BUTTS.

HUGHES v. EVANS.

EVANS v. HUGHES.

1823.

1st February.

THE object of the original Suit, in which *Hughes* and his Wife were Plaintiffs, was to establish a Claim against the personal Estate of *William Chambers*, for a Moiety of the Purchase Money of an Estate which *Hughes* and *Chambers* had agreed to purchase on their joint account. The Cross Bill prayed for a Declaration, that *Hughes* was the Sole Owner of this Estate, and that *Chambers's* Personal Estate was not liable for any part of the Purchase Money.

Baron and Feme.

Where a married Woman, having a separate interest, joins as a Co-plaintiff or Co-defendant with her Husband, instead of suing by her Next Friend or answering separately, it is to be considered as the Suit or Defence of the Husband alone, and will not prejudice a future claim by the Wife.

In November 1817, *Hughes* and *Chambers* entered into a Partnership as Farmers, and occupied a Farm as Joint-tenants and Partners, till the death of the latter. In 1812 they entered into a Contract for the purchase of an Estate, on their joint account, and were both of them Parties to the Agreement for the Purchase. In March 1814, which was long after the time fixed for the completion of the Contract, *Hughes* paid the whole of the Purchase Money, and took a Conveyance of the whole Estate to himself in Fee Simple; but he now insisted that he did so without intending to take the whole Purchase on himself, but merely as an accommodation to *Chambers*; and that he took the Conveyance of the

1813.

HUGHES

v.

EVANS.

entirety of the Estate to secure the Repayment of his Moiety of the Purchase Money.

In August 1814 *Chambers* died intestate, leaving his Brother, *George Chambers*, and his Sister, who was the Wife of *Hughes*, his only next of Kin, and *George Chambers*, his Heir at Law. Mrs. *Hughes* and *George Chambers* became Joint Administrators of his Estate and Effects ; but the Plaintiff, *Hughes*, stated, that *George Chambers* alone acted in the Administration of the Intestate's Estate, and that no part of it was possessed by Mrs. *Hughes*. No part of the Purchase Money was ever paid to *Hughes* by *George Chambers* ; nor did it appear that *Hughes* ever applied to him for any such Payment. Many accounts were settled between *Hughes* and *George Chambers*, as to the Intestate's Estate, but it did not appear, though these accounts were settled, that any thing passed between them as to the Purchase Money.

In 1818 *George Chambers* died, and devised all his Real Estates to the Defendant, *Evans*, in trust for such purposes as Mrs. *Hughes* should appoint ; and, in default of appointment, in trust for her separate use for her life, with remainder to her right Heirs ; and he bequeathed all his Personal Property to the Defendant, *Evans*, absolutely, and appointed him Sole Executor of his Will. *Evans* proved the Will and acted in the Trusts. On the death of *George Chambers*, *Hughes* sought to throw a moiety of the Purchase Money as a charge on the Personal Estate of *William Chambers*. The original Bill charged, that on the partnership farming transactions, a large balance was due to the Plaintiff, *Hughes*, at the time of *William Chambers*'s death ; and it prayed accounts as to those transactions,

and Payment out of *George Chambers's* Estate, in respect of the Assets of *William Chambers* possessed by him.

1843.

HUGHES
v.
EVANS

It appeared that *George Chambers*, and *Hughes*, in right of his wife, had treated *William Chambers's* Personal Estate as equally divisible between them. *Evans*, in his Answer, and in the Cross Bill, insisted that, after the Contract for the purchase of the Estate, a new arrangement was entered into by *Hughes* and *William Chambers*, by which *Hughes* was to take the purchased Estate on his own account, and to pay the whole of the Purchase Money; that *William Chambers* abandoned the Contract with the consent of *Hughes*; that *Hughes* paid the Purchase Money on his own sole account, and executed a Mortgage of the Estate to raise the Purchase Money; and that no demand was ever made by *Hughes*, in respect of the Purchase Money, during the life-time, either of *William* or of *George Chambers*. Various acts and declarations by the Plaintiff, *Hughes*, were insisted on by *Evans*, as Evidence of these matters.

The Causes now came on to be heard.

Mr. *Hart* and Mr. *E. R. Daniell*, for the Plaintiffs in the original Cause, insisted, that none of the acts or declarations of *Hughes*, could be used as Evidence against his wife, who was Co-plaintiff. In this Case, *Hughes* sued in right of his wife, and, though she was joined as Plaintiff, it could only be considered as the Bill of the Husband. *Paulet v. Deval* (a), *Griffith v. Hood* (b).

(a) 2 Ves. 666.

(b) 2 Ves. 452.

1823.

HUGHES

v.

EVANS.

Mr. *Bell* and Mr. *Pemberton*, for the Defendant in the original Cause, insisted, that as the wife was a Co-plaintiff, and joined in the Suit, she thereby made the conduct of *Hughes* evidence against herself, as well as against him.

The VICE-CHANCELLOR :—

It has been insisted, that the declaration and conduct of *Hughes* as to this Purchase, though good Evidence against him, are not Evidence against his Wife. Upon the authority of the Cases which have been cited, I am of opinion, that where Husband and Wife join in a Suit as Plaintiffs, or answer as Co-defendants, it is to be considered as the Suit or Defence of the Husband alone, and that it will not prejudice a future claim by the Wife in respect of her separate interest (c). I shall make a Decree, intitled in both Suits, dismissing the Husband's claim for the Moiety of the price of the Estate, and directing accounts to be taken of the Partnership between *Hughes* and *William Chambers*, and of the personal Estate of *William Chambers*.

The Decree to that effect was made in both the Causes.

(c) See *Mole v. Smith*, 1 J. & W. 665.

COLE v. FITZGERALD.

1893.
3d February.

Legacy.

JOHN FITZGERALD, by his Will made in 1812, gave to *Elizabeth Cole* his Dwelling-house, Garden and Premises at *Romsey*, for her life, and also all and singular the Household Furniture and other Household Effects of and belonging to him in the said Dwelling-house and Premises at the time of his decease.

A Bequest of Household Furniture and other Household Effects in a Dwelling-house and Premises, comprises all Property kept therein either for use or ornament.

The Question was, what articles passed to *Elizabeth Cole* under the bequest of " Household Furniture and other Household Effects."

The following articles were found in the Dwelling-house and Premises, at the Testator's death; four fowling pieces, a pair of pistols, lathes and apparatus for turning, models of a cutter and mortar, several paintings in frames, about a hundred volumes of books in general circulation, an organ, a parrot and cage, a grey poney, a cow, a hay-stack, and a considerable stock of wines and liquors.

Mr. Bell and *Mr. Garratt*, for the Petitioners.

THE VICE-CHANCELLOR:—

The words, " Household Furniture and other Household Effects," will comprise all Property in the House and on the Premises, intended for use or consumption therein, or for the ornament thereof. *Elizabeth Cole* is, therefore, entitled to the pistols, to the apparatus for turning, to the models, paintings, organ, parrot, books, and wine and liquors; but not to the poney, cow, or fowling pieces, unless it is proved that they were kept for the defence of the house. If the hay-stack was only for use, it would pass; if for sale, it would not pass.

According to Mr. Russell's note of facts sent the parrot did not pass. See S.C. 3 Russ. 801.

Confirmed on appeal. 3 Russ. 303

190

CASES IN CHANCERY.

Williams v. Edwards 2 Sim. 78

2. N. H.

1823.

4th, 5th, 8th, &
19th February.

*Specific
Performance.
Right to River
Water.*

The Court refused to decree the specific Performance of an Agreement to purchase the Fee Simple of certain Lands, and also the right to impound the Water of a River, and to divert from it a Stream of Water; because the Vendor, though seised in Fee of the Lands, had only a Lease for ninety-nine years of the other subjects of the Contract, and had not, as against some of the Proprietors of Land on the banks of the River, a right to divert the Water; and because the Purchaser had entered into the Contract for the purpose of erecting a Manufactory to be wrought by the Water, and twelve years had elapsed between the time of the Agreement and the hearing of the Cause.

* Every Owner of Land on the banks of a river has, *primé facie*, an equal right to use the Water, and cannot acquire a right to throw the Water back on the Proprietor above, or to divert it from the Proprietor below, without a Grant, or twenty years enjoyment, which is evidence of a Grant.

Qu. To what extent time is of the essence of a Contract, where the purchase is intended with a view to commercial purposes, as the erection of a Manufactory?

WRIGHT v. HOWARD.*

HOWARD v. WRIGHT.

THE original Bill in this case was filed by the Vendor, and prayed for the specific performance of an Agreement, contained in three several memorandums in writing, for the purchase of land, and of the right of using the stream of the river *Goit* by impounding the water. The Cross Bill was filed by *Howard*, the Purchaser, and prayed that the Agreements might be delivered up to be cancelled; because they had been obtained by fraud and misrepresentation, as well as because the Vendor could not make a good title.

Before the Agreement in question was made, *Nathaniel Wright*, the Plaintiff in the original Suit, was in possession of land situated on the bank of the river *Goit*, and had erected a weir on that river to divert the stream into his land, with a view to erect a mill, which was to be wrought by this stream. He had also made a sluice and two reservoirs for the water diverted by the weir, to secure a constant supply to the stream which was to be used for the mill. By the Agreement in question, *Wright* agreed to sell to *Jesse Howard*, the Defendant in the original Suit, the land, the weir, the sluice, and the reservoirs

for the purpose of erecting a cotton manufactory, together with the right to turn the water, after it had been used in the manufactory, through a piece of land called the *Woodheys* into the river *Mersey*, below the junction of the *Goit* with that river. By turning the water in at this place and in this direction, a fall of twenty-three feet was obtained. But between the weir and the point where it was thus agreed that the water should be turned in, there were three Proprietors on the banks of the River; namely, the *Duke of Norfolk*, (then Mr. *Bernard Howard*) Mr. *Arden*, and Mr. *Tatten*. The only question of Title, was, as to the right to the water and to the reservoirs.

The first Memorandum of Agreement, was dated the 6th of September 1809. It recited that the Plaintiff had a water-fall on the river *Goit*, upon which he had erected a weir, and made a goit (sluice) to other his lands, called *Woodhead* and *Woodheys*; and it then contained an Agreement to sell the water-fall, weir and goit, and the land and buildings, to the Defendant, reserving a yearly rent of 330 *l.*; and the Defendant was to covenant, that he would, within five years, erect buildings to the value of 7,500 *l.* on the land.

The second Memorandum was dated the 15th of September 1809, and was made for the purpose of stating the Agreement more distinctly. It was expressed as follows: "Mr. *Wright* to convey to Mr. *Howard* at his expense, the Fee Simple of and in a messuage, &c." (describing the land, buildings, and other particulars) "also the weir, culvert and stop-gates erected by Mr. *Wright* across the river *Goit*, and the privilege of impounding the stream of the river *Goit* thereby, as high towards *Marple Bridge* as Mr. *Wright* has power to do; and also of using the goit (sluice) lately made by Mr. *Wright* through his field, called the *Ridge-eyes-fold* into

1823.

WRIGHT

v.

HOWARD.

1823.

WRIGHT
v.
HOWARD.

the *Woodhead*, with the intention of diverting the said stream; also the use of the reservoirs made by Mr. *Wright* for preserving the stream of water."

The third Memorandum was dated the 25th of May 1810; and, after reciting the Agreement, it provided that, in lieu of the yearly rent of 330 *l.*, *Howard* should pay the sum of 6,600 *l.* in two payments, 3,000 *l.* on the 24th June 1810, and 3,600 *l.*, without interest, on the 24th June 1813; for which last sum *Howard* was to give his Bond; and it then stated that *Howard* should have full power, right and title to turn and discharge the water into the river *Mersey*, through any part of the *Woodheys* which he should think proper.

Soon after this last Memorandum was executed, some difficulties suggested themselves to *Howard* as to the power of the Plaintiff, *Wright*, to make a Title to the Privileges thus agreed to be sold; and, as these difficulties seemed to him insurmountable, on the 16th of July 1810, he sent a Notice in writing to the Plaintiff, stating that, in consequence of the defects in the Title, he relinquished and gave up the Agreement, and required that that part of the Purchase Money which he had paid should be returned to him.

When *Wright* produced his Title, it appeared that he had not a Fee Simple Interest in the right to use the water; and that part of the land which formed one of the reservoirs was Leasehold for a term of years. His Title to the water was by a Lease from Mr. *B. Howard*, (now the *Duke of Norfolk*) dated the 30th of October 1809. By this Lease, which was for the term of ninety-nine years, the Land, of which a part was covered by one of the reservoirs included in the Agreement, was demised to *Wright*, his Executors, Adminis-

1823.

WRIGHT
vs.
HOWARD.

trators, and Assigns, together with an authority to divert the water of the river *Goit*, by means of the weir which he had then lately erected, for the purpose of a Cotton Manufactory, into the Land agreed to be sold to Mr. *Howard*; but upon the express condition that he returned a part of the water so used into the river *Goit*, at a point far above its junction with the *Mersey*, and therefore far above the *Woodheys*, the place at which it was stipulated by the Agreement that Mr. *Howard* should have the privilege of returning it.

Besides this, it appeared that between the junction of the *Goit* and *Mersey*, and the place at which, according to the Agreement, the water was to be returned through the *Woodheys*, two other Proprietors, Mr. *Tatton* and Mr. *Arden*, possessed Lands on the banks of the *Mersey*.

Mr. *Howard* having given notice that he would not perform the Agreement on account of defect in the Title, Mr. *Wright*, on the 11th February 1811, filed the original Bill for a specific performance of the Contract. In February 1815, Mr. *Howard* filed the Cross Bill. On the 14th of March 1816, Mr. *Wright* obtained a new Lease from the *Duke of Norfolk*, on the surrender of his Lease of the 30th of October 1809; and, by this new Lease, all that was comprised in the former Lease was re-demised to him for the Term of Ninety-four Years, and the obligation to return the stream of the river *Goit* into that river before its junction with the *Mersey*, was discharged, and an unrestricted enjoyment of the stream was granted during the continuance of the Lease.

In 1818 *Wright* died; and in that year his Representatives filed a Supplemental Bill, which stated this

VOL. I. O

1823.

WRIGHT

v.

HOWARD.

new Lease, and insisted on the specific performance of the Agreement.

It appeared by the evidence, that if the stream, the use of which was to be granted to *Howard*, was turned into the *Mersey* through the *Woodheys*, according to the Agreement, a greater fall by three feet would be gained than could be had by returning it into the river *Goit* at any point above the junction of that river with the *Mersey*. This additional fall was of great importance to the Cotton Manufactory. It also appeared, that the privileges as to the use of the water, which were contained in the Agreement, constituted the most valuable part of the subject of the Contract; and that, without these Privileges, the Property was not worth more than one-third of the price which Mr. Howard agreed to pay.

The objections to the Title which were insisted upon by *Howard* were, therefore :

First, as to the Weir; that *Wright*, as against the *Duke of Norfolk*, the Proprietor of Land on one bank of the river above the Weir, had acquired no right to maintain it beyond the Term of his Lease; whereas, the Language of the Agreement imported an absolute Right:

Second, that the Agreement was expressed for an unqualified Grant, in Fee-simple, of the use of the two Reservoirs; whereas one of these Reservoirs was upon a part of the Land demised for a term of Years by the *Duke of Norfolk* to *Wright* :

Third, that, at the time when the last Memorandum of Agreement was executed, by which *Wright* expressly

engaged that *Howard* should have the power of turning the stream into the River *Mersey*, through any part of the field called the *Woodheys*, which was the subject of *Howard's* Purchase, *Wright* had no power to grant any such privilege; but was bound by his Lease from the *Duke of Norfolk* to return the water into the river *Goit* at a point much above the *Woodheys*, and was, consequently, then unable, as against the *Duke of Norfolk*, to perform his Contract. And that, although by the new Lease of March 1816, the *Duke of Norfolk* had dispensed with that obligation, yet he had dispensed with it only for a term of years, and not absolutely; and that, as against Mr. *Tatton* and Mr. *Arden*, the other Proprietors of Land between the Weir and the *Woodheys*, there was no ground for stating, that *Wright* had acquired the power of diverting the water into the River *Mersey*, which he had undertaken to grant to Mr. *Howard*.

1823.

WRIGHT
v.
HOWARD.

Besides these objections, *Howard* insisted, in his Answer to the Supplemental Bill, that, at such a distance of time, (it being then ten years since the Agreement was made) the Vendor was not entitled to have it specifically performed; that the Land and Buildings had become waste and dilapidated, so as to have greatly decreased in value; that he had entered into the Agreement for the purposes of trade; and that, on account of the delay, together with the change of times and circumstances, he could not now make use of the subject of the Contract for the purposes intended at the time when the Agreement was made; although they might have been advantageously used for those purposes, at the time when the Agreement was made, if *Wright* had been able to make a Title to the stream of water according to his Contract. It was also stated by *Howard*,

1823.

WRIGHT
v.
HOWARD.

in his Answer to the original Bill, that it would cost 15,000*l.* to build the intended Cotton Manufactory, so as to have the benefit of the stream of water, and that, after expending so large a Sum, the right to the use of the water must determine with the Lease.

The original and Cross Cause now came on to be heard together. There was no evidence in support of the Fraud charged by the Cross Bill ; and that point was not much insisted on at the hearing.

Mr. *Bell*, and Mr. *Koe*, for the Plaintiff, in the original Cause :—

I. The Terms of the Agreement do not import a Sale of the *Fée Simple* interest in the right to use the water. The words *Fee Simple*, refer merely to the Land ; and there is nothing on the face of the Agreement which shows that *Wright* professed to give a *Fee Simple* right to impound the water as high as *Marple Bridge* : on the contrary, it is expressed to be such privilege of impounding as *Wright* had. This privilege is mentioned in the Agreement as something distinct and separate from the Land.

II. As to the right to divert the water from the Proprietors of Land on the banks of the river between the weir and the *Woodheys*, there is no authority for the position, that a Proprietor of Land on the banks of a river has no right to divert the water of the river which runs by the Land of any other Proprietor, unless he returns the water again so as to run by the Land of that Proprietor. According to the principles of the Law on this subject, a Proprietor of Land on the banks of a river has a right to divert the water, unless he

does it so as to occasion an actual injury to a Neighbour. Without an actual injury, there can be no right of Action. In the present Case, where the weir was erected so long ago as 1804, and no complaint of any injury being sustained by it was made by any of the Neighbours, an actual right to use the water may be considered to have accrued at this distance of time. Certainly, after so long an acquiescence by the Neighbours, without any complaint of an injury, no Court of Equity would now grant an Injunction against this weir. Therefore, as there is no room to say that the Neighbours have been injured by the water being diverted, there is no room to say that the Plaintiff had not a right to divert it by this weir, and to enjoy those rights which he agreed to sell to the Defendant.

1823.
WRIGHT
v.
HOWARD.

III. As to the objection of the length of time that has elapsed, there is no ground for holding that, in the present Case, Time is of the essence of the Contract. It was not, till the Answer to the Supplemental Bill in 1819, that this objection was taken by the Defendant. In none of the previous Answers was that point mentioned. Time cannot be of the essence of the Contract, unless the Parties make it so by the terms of the Contract. There may be cases in which, if the Contract is entered into with a view to Commercial purposes, the Court will be disposed to consider Time as of the essence of the Contract. But that cannot be done where no such objection is raised until the expiration of several years from the commencement of the Suit.

IV. The Plaintiff has a right to a reference, that he may have an opportunity to perfect his Title. The alleged defects are subjects for compensation.

1823.

WRIGHT
v.
HOWARD.

Mr. *Pechel*, for one of the Representatives of *Wright*.

Mr. *Agar*, Mr. *Heald*, and Mr. *Parker*, for the Defendant in the original Suit :—

I. The terms of the Agreement are express as to a Fee Simple interest in the whole subject of the Contract. An agreement to grant, without qualification, must necessarily mean a grant of an absolute right; and any limitation of that right must be expressed. But the extent of the money to be laid out in erecting the Manufactory, and the amount of the Purchase Money, sufficiently show that a Fee Simple interest in the whole subject of the Agreement, was in the contemplation of the Parties. It cannot be supposed that the Defendant would have entered into this Contract, if, after having expended so large a sum in erecting a Manufactory, the whole of the money thus expended might become useless after the expiration of the existing Lease, by a refusal, on the part of the *Duke of Norfolk*, to renew it.

II. As to the right to use the water, the Plaintiff had no Title, as against Mr. *Tatton* and Mr. *Arden*, either by grant or prescription. He might be compelled by them to remove the weir. The mere erection of the weir and the diversion of the water so as to diminish the quantity which passed their Land, was injury enough. Taking away the water must, of itself, be injurious.

III. This is precisely one of those Cases in which the Court will hold Time to be of the essence of the Contract, and will not, after such a lapse of Time, decree the specific Performance of this Agreement. In *Crofton v. Ormsby* (a), it was laid down by Lord *Redesdale* as the doctrine of Courts of Equity, that a specific performance

(a) 2 Sch. & Lef. 604.

of an Agreement for a Purchase would not be decreed, where the object of one of the contracting parties would be defeated by delay which had taken place. This doctrine is most thoroughly adhered to in Cases where the Purchase contemplated by the Agreement, is with a view to a Commercial purpose. On this ground, in a Case of *Parker v. Frith* (b), the Court refused to decree

1823.

WRIGHT
v.
HOWARD.

(b) This Case was decided by the *Vice-Chancellor* in 1819. There does not appear to be any entry of the Case in the Registrar's Books. The following Report of the Case is from an authentic source:—

PARKER v. FRITH.

1819.
17th June.

THIS was a Bill for the specific Performance of an Agreement, entered into by the Defendant, to take a Lease of certain Mines, and to purchase certain Machinery and Tools, at a Valuation.

Specific Performance.

The Plaintiff agreed to grant to the Defendants a Lease, for a term of forty-two years, at certain specified rents, of an iron-stone mine, a coal mine, a blast furnace and engine; and the tools, &c. were to be paid for by the Defendants, according to a Valuation to be made by Arbitrators. The Agreement was made on the 27th of March 1810; and it provided that the Lease should commence, and Possession be given as to the Minerals, from Michaelmas 1810, and as to the Works, from Ladyday 1811. The Plaintiff was informed that immediate Possession, at these dates, was of great consequence to the Defendants, with a view to the purposes of their trade, which they carried on as Partners. The Plaintiff, however, did not deliver an abstract of his Title till February 1811, when it appeared, that, on account of some subsisting Mortgages to which the Plaintiff's estate was liable, it was necessary that the Mortgagees should concur in the Lease, although the Plaintiff had not made arrangements to procure their concurrence. When the Abstract was delivered, the Defendants complained of the delay, and stated to the Plaintiff, that it had already been injurious to them, and that they should require compensation; and the Plaintiff, upon this, promised them a reasonable compensation. Further delays and difficulties occurred, which made the Defendants, before August 1811, abandon all thoughts of the Agreement being performed. They therefore were then obliged to provide elsewhere the iron which they intended to have made, before that time, in the furnace, which was part of the subject of the Agreement. They therefore refused to name Arbitrators to proceed with the Valuation, according to the Agreement. The Plaintiff, in September 1811, served

Bill for the specific Performance of an Agreement to take a Lease, for forty-two years, of Iron and Coal Mines and Machinery, for the purpose of Trade, dismissed on account of delay on the part of the Lessor to make out his Title, and to give Possession at the time stipulated in the Agreement.

1823.

WRIGHT
v.
HOWARD.

specific Performance of an Agreement for the Lease of a Coal-mine, where a considerable delay had taken place. But, in the present case, where the Contract was entered into with a view to a Commercial Establishment, on which a large sum of money was to be expended, and where fourteen years had elapsed since the Contract was made, it would be not only unjust, but highly impolitic, if the Defendant was forced to a performance of the Contract. According to the Terms of the Agreement the Manufactory was to be erected within five years from the Time when the Agreement was made; and it would now be too great a hardship to force upon him an Agreement of which that was one of the conditions. If the Defendant, desiring to embark all his property in this undertaking, was induced to enter into this engagement, and then found that the Vendor could not put him in possession, would the Court act on a principle which must suppose that the Defendant, thus contracting, was to give over all thoughts of employing his money in trade until a Chancery Suit was decided? Was he to keep his capital unemployed all the while, because, at the end of twelve years, the Vendor, by some acts done in the interval, was able at that

PARKER
v.
FRITH.

a Notice upon them, requiring them to name Arbitrators, and on their refusal, he himself appointed Arbitrators, who proceeded to a valuation *ex parte*; and in Trinity Term 1812, he filed this Bill for a specific Performance. The Plaintiff having died soon after the Bill was filed, his Representatives revived the Suit in 1815.

In 1819 this Cause came on to be heard.

Mr. Bell, Mr. Shadwell and Mr. Wrottesley for the Plaintiff.

The Vice-Chancellor, considering the object of the Agreement, and the delay which had taken place, refused to decree a specific Performance, according to the terms of the Agreement, and said that he could not, from the nature of the case, see his way to direct a specific Performance with a pecuniary Compensation. The Defendants having made some unfounded objections, were refused their Costs.

Bill dismissed without Costs.

distance of Time to make a Title? Or to put it the other way: suppose that the Defendant, finding that the Vendor could not make a Title according to the Agreement, gave notice in 1810 (as was done in this Case) that he considered the Agreement at an end; that he then entered into some other speculation; built a factory, perhaps, elsewhere; that in the course of some years a change of times takes place, adverse to such speculations: what a monstrous hardship it would be to force the application of the ordinary rule in such a case, and to hold the Defendant to the ordinary rule, which would compel a specific Performance?

1823.

WRIGHT
v.
HOWARD.

IV. This is no Case for Compensation. It is a Case where the Vendor, having only a leasehold Title, undertakes to sell the Fee Simple, and is within the class of Cases on this subject which decide that there ought to be no specific Performance in such cases. In the Case of *Tendring v. London(c)*, where one contracted to sell an Estate of which he was not the absolute Owner, and had it not in his power, by the ordinary course of Law or Equity, to make himself so, though the Owner offered to make the Vendor a Title, yet the Court would not force the Purchaser to take it(d). And the general

(c) 2 Eq. Abr. 680, pl. 9.

(d) In *Drew v. Corp*, 9 Ves. 368, it is stated to have been decided that the principle of Compensation cannot be extended to compel a Purchaser to take a Leasehold, though for a very long term, instead of a Freehold Title. On referring to the Register's Book, the following are the facts of that Case, as stated in the Master's Report, which was adopted by the Decree. The Master found that the Plaintiff could make a good Title to the Estate in question, upon *John Langdon* joining in the Conveyance; and he found that *John Langdon* was then seized of the Fee Simple in the Estate, subject to a Mortgage term of 4,000 years, foreclosed by a Decree of this Court in 1776, and then vested in Trust for the Plaintiff; and also subject to a Mortgage of the Reversion in Fee, made in the year 1763, to one *Degony King*, but which was then vested in the Plaintiff;

1823.

WRIGHT
v.
HOWARD.

doctrine of the Court warrants the proposition, that where a man undertakes to sell an Estate, knowing at the time that he has no Title, the Court will not compel the Purchaser to a specific Performance, even although the Vendor procures a Title before the *Master* makes his Report.

The VICE-CHANCELLOR :—

The first consideration is, whether the original Plaintiff, Mr. *Wright*, could, when he received the Notice of Abandonment from Mr. *Howard*, or at the time when the original Bill was filed, give to Mr. *Howard* an effectual Title to the different subjects of the Contract. And the next consideration will be, whether he can now make such effectual Title. It is objected to the Title, first, that as to the weir itself, Mr. *Wright* had no right to maintain it for the purpose of throwing back the water, as against the *Duke of Norfolk*, considered as the Proprietor of the Land above, except originally for the term of the Lease of the 8th October 1809, and now for the term of the Lease of the 14th March 1816. Secondly, that, as against the *Duke of Norfolk*, considered as the Proprietor of the Land below, Mr. *Wright* had no Title to turn the water, diverted by means of the weir, into the *Mersey*, from the western point of the *Woodheys*, until he obtained the Lease of March 1816, and that he now has no right so to turn the water, except for the term of that Lease. Thirdly, that as against Mr. *Tatton* and Mr. *Arden*, the other Proprietors of the land below the weir, Mr. *Wright* never had, and his Representatives have not now, any Title to turn the water, diverted by means of the weir, into the *Mersey*, from the said western point of the *Woodheys*. And but that *John Langdon* refused to join in a Conveyance, and therefore the *Master* found that the Plaintiff could not make a good Title. *Drewe v. Corp*, Reg. Lib. A. 1803, f. 290.

lastly, that as to one of the two reservoirs, the unqualified use of which Mr. *Wright* agreed to grant to Mr. *Howard*, it is made, in part, upon land demised by the *Duke of Norfolk* originally by the Lease of October 1809, and now by the Lease of March 1816; and, consequently, Mr. *Wright*, or his Representatives, have no Title to it, except for the term of the Lease.

1823.

WRIGHT
v.
HOWARD.

The right to the use of water rests on clear and settled principles. *Primâ facie*, the Proprietor of each bank of a stream is the Proprietor of half the land covered by the stream, but there is no property in the water. Every Proprietor has an equal right to use the water which flows in the stream; and, consequently, no Proprietor can have the right to use the water to the prejudice of any other Proprietor. Without the consent of the other Proprietors, who may be affected by his operations, no Proprietor can either diminish the quantity of water, which would otherwise descend to the Proprietors below, nor throw the water back upon the Proprietors above. Every Proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the Proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years: which term of twenty years is now adopted, upon a principle of general convenience, as affording conclusive presumption of a grant. It appears to me, that no Action will lie for diverting or throwing back water, except by a person who sustains an actual injury; but the Action must lie at any time within twenty years when the injury happens to arise, in consequence of a new purpose of the party to avail himself of his common right. The question of Title as to the water, in

Principle of the right to the use of River Water.

*cited. & followed
3 B. & Ad. 312 by
1st Entenden her
curiam.*

1823.

WRIGHT
v.
HOWARD.

this Case, will readily be tried by these plain principles. It appears by the recitals in the Lease from the *Duke of Norfolk* in October 1809, that the weir which throws the water back above, was erected by Mr. *Wright* in 1804: and, consequently, Mr. *Wright* could have no Title to maintain this weir against the *Duke of Norfolk*, considered as the Proprietor of land above, except by actual grant; and that grant is to be found in the Lease of October 1809, and also in the subsequent Lease of March 1816, and therefore endures only for the term of the latter Lease, and is not a grant in Fee Simple, according to the effect of Mr. *Wright's* Agreement with Mr. *Howard*.

As against the *Duke of Norfolk*, considered as the Proprietor of land below, Mr. *Wright* was bound, by the Lease of October 1809, to return the water which should be diverted by the weir into the river *Goit*, at a certain point stated, and consequently had no Title to enable Mr. *Howard*, according to the Agreement, to turn the water so diverted into the *Mersey*, at the west end of the *Woodheys*. Mr. *Wright* afterwards, by the Lease of March 1816, acquired, as against the *Duke of Norfolk*, considered as such Proprietor below, this right to turn the water into the *Mersey*; but he acquired it, not in Fee Simple, according to the effect of his Agreement with Mr. *Howard*, but for the term of that Lease only.

With respect to Mr. *Tallon* and Mr. *Arden*, the other Proprietors of the land below, between the weir and the west end of the *Woodheys*, it is clear that Mr. *Wright* could have no right, at the time of filing the original Bill, to turn the water into the *Mersey* below their lands, except by express grant or licence; and no such grant

or licence is pretended. The time that has since elapsed can afford no presumption of such a grant; because, in fact, the water has not been so turned into the *Mersey*.

1823.

WRIGHT
v.
HOWARD.

The last objection to the Title does not apply to the use of water, but to the land demised by the *Duke of Norfolk*, which forms a part of one of the reservoirs. Mr. *Wright* has undertaken to grant the use of this reservoir, in Fee Simple, to Mr. *Howard*. It is plain he can make no Title to it, except for the term of the *Duke of Norfolk's Lease*.

Upon the whole, I am of opinion that Mr. *Wright* not only could not make a good Title, in the four respects which have been stated, at the time when Mr. *Howard* gave notice of his intention to abandon the Contract, and at the time of filing the original Bill, but that he cannot now make a good Title in either of these respects. Without thinking myself called upon to make any general declaration as to the distinction between land contracted for as mere property, and land contracted for with a view to be used for a commercial establishment, I cannot now give to the Representatives of Mr. *Wright* the chance of perfecting their Title before the *Master*, in order that I may compel Mr. *Howard*, at the distance of fourteen years, to return to a commercial speculation, which he was then obliged to desert, from Mr. *Wright's* inability to perform his engagement.

The Bill must be dismissed, and with Costs; except as to so much of the Costs as may have been occasioned by Mr. *Howard's* suggestions of fraud and misrepresentation, which are altogether disproved: and let those Costs be paid by Mr. *Howard*. With respect to

1823.

WRIGHT
v.
HOWARD.

the Cross Bill, I shall direct the three Agreements to be delivered up to be cancelled; but I shall make this Decree without Costs; because this Cross Bill prays that it may be declared that these Agreements were obtained by fraud and misrepresentation, allegations which, I have before stated, were altogether disproved; and it is the duty of the Court to discourage the abuse of its proceedings by the introduction of imputations disgraceful to character, which prove to be altogether unfounded.

1823.
3d February.

*Administration
of Assets.
Practice.*

POTT v. GALLINI.

THE Plaintiff in this Suit was a simple contract Creditor of *Francis Cecil Gallini*, deceased. The Bill was filed by her in April 1817, on behalf of herself and the other simple contract Creditors of *Gallini* who should contribute to the expense of the Suit, against his Heir-at-Law and Executors, and also against other persons, who were charged with having possessed Assets of the Debtor; and it prayed for an Account of *Gallini's* Assets, that they might be applied in a due course of administration, and that they might be marshalled. It appeared, that, in 1815, very soon after *Gallini's* death, an amicable Suit was instituted for the administration of his Assets, in which his Children, who were the residuary Legatees and Infants, were the Plaintiffs, and his Executors and Trustees, the Defendants; that, in July 1816, a Decree was made in that Suit, which directed the usual Accounts to be taken, and the Debts to Decree, directing the usual Accounts and the Assets to be marshalled, with liberty to the *Master* to use the Accounts taken under the former Decree.

If the second Suit had been merely for the same objects as the first, the Decree in the first Suit would have been a bar to it, and the Court, on Motion before Answer, would have ordered all proceedings in it to be stayed.

1823.

POTT
v.
GALLINI.

be paid. Under this Decree, the *Master* took the necessary proceedings, and caused advertisements for Creditors to be published. Nearly all the Creditors had come in before the *Master*, and the time limited for proving their debts had expired in December 1816. The Plaintiff in this Suit had not come in to prove her alleged debt under that Decree. The Defendants, the Executors, therefore submitted to the Court, by their Answer, whether the Plaintiff ought not to have proved her alleged debt before the *Master* in the prior Suit; and whether she was now entitled to proceed in this Suit.

No Report had been yet made by the *Master*, in the first Cause; and the Bill in that Cause did not pray that the Assets might be marshalled, nor was that directed by the Decree.

The Plaintiff in this Cause moved, on the 15th of April 1818, pursuant to a notice, that a fund in Court in the first Cause might be transferred, so as to stand as a fund in this Cause. The Court, on this Motion, did not direct the fund to be transferred; but ordered that it should not, in any manner, be disposed of without notice to the Plaintiff in this Cause, and that she should be at liberty, by her Solicitor, to attend the *Master* on taking the Accounts of the Personal Estate directed by the Decree in the first Cause.

The Cause came on now to be heard.

Mr. *Bell*, Mr. *Treslove*, and Mr. *Fearnley*, for the Defendants, insisted that the Decree in the former Suit was sufficient, and that they were entitled to the same benefit of that Decree, in the present Suit, as if they

1823.

POTT
v.
GALLINI.

had pleaded it. As to marshalling the Assets, that might be done at any time, on an application in the former Suit. It was decided, in *Gibbs v. Ougier* (a), that a new Bill is not necessary for that purpose, in such a case as the present. In order, therefore, to justify the Plaintiff for instituting this Suit, it is necessary that she should prove satisfactorily that she had no Notice of the prior Suit and Decree. In one respect this Suit is more defective than the other, inasmuch as the residuary Legatees are not made Parties to it. If the Court should be disposed to think this Suit justifiable, it would be the most convenient course to have it stand over till after the *Master's* Report is made in the prior Suit.

Mr. *Hart* and Mr. *Wakefield*, for the Plaintiff, said, there were two material questions to be considered in this Case. 1st, In what respect a Creditor was to be delayed by the Decree in the Suit already subsisting? And 2d, Whether the filing of the Bill in the present Cause was a step so unnecessary and vexatious, that the Court would not make a Decree upon it? As to the first question, the primary object of the prior Suit was, not to satisfy the Creditors, but to have the Accounts taken in an amicable way, and to restrain the Creditors from proceeding at Law. The relief to be had under that Suit was not so ample as that to which the Creditors were entitled, and which is sought, by the present Bill. The Heir-at-Law was a Plaintiff in the other

(a) 12 Ves. 416. In that case it was said by Sir *W. Grant*, M. R. "that if it appeared for the first time by the Report, that a specialty Creditor was paid out of the personal estate, it would not be necessary to file another Bill for the purpose of marshalling the Assets." That must of course apply only to cases where the Heir-at-Law or Devisees are Parties to the first Suit.

Suit; and there was no case in which, where the person who had an interest to repel the claims of Creditors was a Plaintiff in a subsisting Suit, the Court had thought that a sufficient reason to refuse to make a Decree at the suit of a Creditor. The Plaintiff in this Cause sought to have the Assets marshalled, which had not been done in the first Suit.

1823.
POTT
v.
GALLINI.

Mr. *Bell*, in reply, said, that the Heir-at-Law was an Infant when the Decree in the first Cause was made, and that, therefore, the Assets could not be marshalled, because the Parol would have demurred.

Query, Whether there can be a Decree to marshal the Assets where the Heir-at-Law is an Infant?

Mr. *Hart* denied that the Law was so, and said, that the Parol demurring could not delay a declaration of the rights of the Parties.

The VICE-CHANCELLOR :—

Inasmuch as the Creditors are entitled to have the Assets marshalled, and cannot have that benefit under the former Decree, I shall make a second Decree for the Accounts, adding a direction to marshal the Assets; and that the *Master* shall be at liberty to use, in this Cause, the Accounts taken in the former Cause. I recommend an Application to be made, in both Causes, that there may be only one Report in both Causes, and that they may both come on to be heard together for further directions.

Where there is a prior Decree, and a second Suit for the same Accounts, and no further relief than can be had before the *Master* under the first Suit, the proper course is, to move that the proceedings in the second Suit may be stayed, and that the Plaintiff may go before the *Master* in the first Suit. It is not the proper

1823.

POTT
v.
GALLINI.

course to insist upon the first Suit, in the Answer, as a bar to the second, because putting in an Answer, in such a case, leads to an unnecessary expense.

If the second Suit prays further relief than can be had in the first Suit, then the Defendant must answer; and the proper course is, to insist, in the Answer, upon the first Suit, as a bar to a second Decree for the same objects.

1823.

18th February.

BALL v. STORIE.

2 Jan. & 18th
178
Sec. 89. Jan.
382
Decree of the
Irish Court of
Chancery.
Deed. Mistake.

THE Plaintiff filed his original Bill in this Court, praying that he might be relieved against a Judgment obtained against him by the Defendant in the Court of King's Bench in *Ireland*, and that the Defendant might be restrained, by a perpetual Injunction, from proceeding in an Action commenced by him against the Plaintiff, in the Court of King's Bench here, on that Judgment.

An Injunction granted by the Court of Chancery in *Ireland*, to restrain proceedings at Law in that country, on an Interlocutory Application, is not of itself a sufficient ground to obtain an Injunction, in this Court, to restrain proceedings in an Action in the King's Bench here, in respect of the same matter.

George Henry Storie, the Defendant, in 1808, purchased from the *Marquis of Headfort* an Annuity of 1,000 *l.* a-year, secured on the real estates of that Nobleman in *Ireland*, for the sum of 6,000 *l.* The estates on which this Annuity was charged being encumbered by annuities to an amount far exceeding the rents, an arrangement was made, in 1811, by which the *Marquis of Headfort* and *Lord Bective*, his eldest Son, were to concur in suffering Recoveries, with a view to having the estates conveyed to Trustees, for the purpose of being sold; and the Trustees were authorized to purchase the

The construction of a written Instrument is the same in Equity as at Law.

A Court of Equity will reform an Instrument which, by the mistake of the Drawer, admits of a construction inconsistent with the true Agreement of the Parties, although the Party seeking to reform it himself drew the Instrument.

1823.

BALL
v.
STORIE.

Annuities of the Annuitants, by giving them Debentures for the amount of their purchase-monies, carrying interest at five per cent, and to be discharged out of the produce of the sale of the estates; the Annuitants agreeing, upon having such Debentures, to concur in the intended sale. The Defendant, amongst others, acceded to this arrangement; and, in 1811, received six Debentures, for 1,000 *l.* each, carrying interest at five per cent. Part of the estates was sold by the Trustees; but, as there were many Encumbrances prior to the Defendant's, and as, under the arrangement which had been entered into, each Encumbrancer was to be paid off according to his priority, no part of the proceeds of the sale was received by the Defendant. In the year 1816, the Defendant filed his Bill, in this Court, against the Trustees, alleging misapplication of the Funds.

The Plaintiff, in 1816, was the Solicitor and Agent for *Lord Bective, in Ireland*; and, in the year 1818, was in *London*, engaged in settling some of his Lordship's affairs. Overtures were at that time made to the Defendant by *Lord Bective*, for a settlement of the Defendant's claim, provided he would desist from the Suit which he had commenced in this Court. But before any arrangement on the subject could be completed, *Lord Bective* was obliged to leave *London*, and he authorized the Plaintiff, as his Agent, to conclude an agreement with the Defendant. Accordingly, on the 13th of April 1818, a Memorandum of Agreement was signed by the Defendant, and by the Plaintiff on behalf of *Lord Bective*, by which it was agreed that the 4,000 *l.* should be paid to the Defendant on the 24th of April 1818, and another sum of 4,000 *l.* on the 24th of July 1818, in satisfaction of his six Debentures; and, in con-

1823.

BALL

v.

STORIE.

sideration of these payments, the Defendant agreed to dismiss his Bill, on payment of all his Costs.

After this Memorandum of Agreement had been signed, it was found that the sum due to the Defendant in respect of his Debentures, with Interest up to the 24th of July 1818, was 8,200*l.*; and the Plaintiff agreed that the Defendant should have this additional sum of 200*l.* As to this additional sum of 200*l.*, the Plaintiff agreed to give his own security, and to bind himself, personally, for the payment of it. But there was no intention that the Plaintiff should make himself liable for any part of the Defendant's claim beyond the 200*l.* Pursuant to this Agreement, the Plaintiff, on the 24th of April 1818, paid 4,000*l.* to the Defendant; and Articles of Agreement, dated on the same day, and made between the Defendant of the one part, and the Plaintiff, on behalf of *Lord Bective*, of the other part, were executed for the purpose of carrying into effect the Agreement expressed in the Memorandum; and therefore containing, amongst other provisions, a Covenant for payment of the 4,000*l.* on the 10th of July 1818: but this Covenant was so framed as to make the Plaintiff personally liable for the 4,000*l.*, as well as for the 200*l.*

Lord Bective did not pay the 4,200*l.* on the 10th of July 1818, pursuant to this Agreement, and, therefore, soon afterwards, the Defendant brought an Action against the Plaintiff for the 200*l.*, and recovered that sum. In consequence of the non-payment of the remaining 4,000*l.*, the Defendant recommenced his proceedings in this Court against the Trustees upon the Debentures. In 1821, however, he discovered that the Articles of Agreement were so drawn as to make the

Plaintiff personally liable for the 4,000 *l.*; and, therefore, immediately commenced an Action against him in the Court of King's Bench in *Ireland*, and recovered judgment for that sum. Upon this the Plaintiff filed a Bill in the Court of Chancery in *Ireland*, stating the facts as to the Agreement, and the mistake by which the Plaintiff was made personally liable for the 4,000 *l.*, and praying for an Injunction to restrain the Defendant from proceeding on the Judgment. The *Master of the Rolls* in *Ireland* refused an Application made to him by the Plaintiff for an Injunction; but the *Lord Chancellor of Ireland*, on an appeal to him, granted the Injunction. The Plaintiff having afterwards come over to this country, the Defendant commenced an Action against him in the Court of King's Bench here, upon the Judgment recovered in *Ireland*. Upon which the Plaintiff filed his Bill in this Court, stating the facts before-mentioned, and that the Plaintiff commenced his Action in this country with full notice of the Injunction granted by the Court of Chancery in *Ireland*, and therefore praying that it might be declared that, under the circumstances before stated, the Plaintiff was entitled to be relieved against the Judgment obtained against him in the Court of King's Bench in *Ireland*, and that the Defendant might be restrained, by a perpetual Injunction, from proceeding on that Judgment, and from all other proceedings to procure payment from the Plaintiff of the 4,000 *l.*

To this Bill the Defendant put in a general Demurrer for want of Equity, and the Case now came on to be heard on the Demurrer.

Mr. Bell and Mr. Pemberton for the Bill:—

I. As to the Articles of Agreement, though the Plain-

1823.

BALL
v.
STONE.

1823.

BALL
v.
STORIE.

tiff is, through mistake, made liable at Law, yet he cannot be considered liable in Equity. Even at Law, where one acting as an Agent executes a Deed, it is considered, not as the Deed of the Agent, but of the Principal. *Wilks v. Back*(a).

II. This Court will adopt the decision of the Irish Court by which the Injunction was granted. It has been decided that, since the Union, the Judgment of an Irish Court is not to be considered as the Judgment of a foreign Court. *Collins v. Lord Mathew*(b). This Court, therefore, will consider itself bound by the Decree of the Court of Chancery in *Ireland*, just as the Court of King's Bench considers itself bound by the Judgment of an Irish Court of Law.

Mr. Trollope, for the Demurrer, relied on the fact, that the Injunction obtained in *Ireland* had been granted on an Interlocutory Application; and contended that the Case stated by the Bill was not strong enough to induce this Court to interfere.

The VICE-CHANCELLOR:—

It has been insisted that this Court ought to follow the Court of Equity in *Ireland*, by granting the Injunction which is sought for by the Plaintiff, without entering into the merits of the Case. I cannot entertain that opinion. An Interlocutory Order of the Court of Chancery in *Ireland*, can only be regarded here, as an authority, and not as binding upon the Court; although a final Judgment of that Court, in a Case in which it has concurrent jurisdiction, might be entitled to different consideration. In the present Case, the Judgment was

(a) 2 East, 142.

(b) 5 East, 473.

obtained in the Court of King's Bench in *Ireland*, upon a written Agreement. The Plaintiff alleges by his Bill that he contracted, in that Agreement, as an Agent merely, and not as Principal. But I cannot hold that this is a case for relief in Equity; because, in the construction of a written Agreement, Equity must follow the Law. The Demurrer to this Bill must, therefore, I think, be allowed. But, as the real merits of the Case are not raised by the present state of the pleadings; and as the Plaintiff, if he can entitle himself to relief, must do so by a Bill which seeks relief, by praying that the Articles of Agreement may be reformed according to the true intention of the Parties, upon the ground that, by mistake, they have not been so framed, I shall permit the Plaintiff to amend his Bill.

1823.

BALL
v.
STORIE.

The Bill was afterwards amended, and *Lord Bective* made a Defendant. The amended Bill prayed, that the Articles of Agreement might be reformed according to the Memorandum and the intention of the parties, by limiting the liability of the Plaintiff to the payment of the 200*l.*; and that the Defendant, *Lord Bective*, might be decreed to execute such instrument as might be necessary for binding him to the performance of the Agreement on his part, and that the Defendant *Storie* might also be decreed to do all acts necessary on his part towards rectifying the Agreement. It charged, that it was not the intention of the Parties that the Plaintiff should make himself personally liable for any sum beyond the 200*l.* and that his personal responsibility for the payment of the 4,000*l.* was never contemplated by either Party, and formed no part of the Contract; and that the Defendant *Storie*, in the Bill filed by him in this Court in November 1818, for carrying the Agreement

1823.

BALL
v.
STORIE.

into execution, stated that it was executed by the Plaintiff, on behalf of *Lord Bective*, and as his Lordship's Agent; and that it was by mistake that the Agreement was so framed as to make the Plaintiff liable for the 4,000*l.* The Defendant *Storie* put in his Answer to this Bill, and, in effect, admitted that it was by mistake that the Plaintiff was made personally liable for the 4,000*l.* But the Answer stated that the Articles of Agreement were drawn by the Plaintiff himself; that the Solicitor of the Defendant *Storie* prepared Articles of Agreement pursuant to the Memorandum, but that the Plaintiff objected to the Deed thus prepared by the Defendant's Solicitor, on the ground that it was too long, and therefore proposed to substitute a Draft which he had himself prepared. The Draft of the Plaintiff was accordingly adopted, only that an additional Clause was inserted, at the time, by the Defendant's Solicitor, which provided for the payment of the 200*l.* by the Plaintiff, and rather tended to favour the construction of his personal liability for the 4,000*l.*

The Plaintiff having obtained the common Injunction, and the order *Nisi* for dissolving it having been obtained, Cause was now shown, on the merits, against dissolving the Injunction.

Mr. *Bell* and Mr. *Pemberton* for the Plaintiff, relied on the following Cases, in which the Court had reformed Instruments which had been framed by mistake in a manner contrary to the intention of the Parties, even where the Instrument was framed by one of the Parties. *Acton v. Pierce* (c), *Bishop v. Church* (d), *Welsh v. Harvey* (e), *Probart v. Clifford* (f), *Simpson v. Vaughan* (g);

(c) 2 Vern. 480. S. C. Pre. Cha. 237.

(d) 2 Ves. 100. and 371. S. C. 3 Atk. 691.

(e) Cited 2 Ves. 102. (f) Ibid. (g) 2 Atk. 31.

Thomas v. Frazer (h), *In re Bate & Henckell* (i), *Grace v. Freeman* (k), *Burn v. Burn* (l). They also contended, that the mistake in this Case was occasioned by the Clause introduced by the Solicitor of the Defendant.

1823.

BALL
v.
STORIE.

Mr. Trollope for the Defendant, insisted that the Plaintiff, under the circumstances, was not entitled to have the Deed reformed.

The Vice-Chancellor seemed at first disposed to think, that, as the Plaintiff was himself a professional man, and drew the Deed with his own hand, he was not entitled to relief on the ground of mistake. But his Honor said, he would take time to consider the Case; and afterwards pronounced the following Judgment.

(h) 3 Ves. 399. (i) 3 Ves. 400. in note. (k) Ibid.

(l) 3 Ves. 573. In the case of *Acton v. Pierce*, where there was a Bond to the intended Wife extinguished at Law by the after-marriage, the principle of the decision was, that the Instrument was evidence of the Contract to pay; and their Heirs, being named, were bound, as well as Executors. So in *Probert v. Clifford*, which was the case of a joint Covenant, by Father and Son, that the Wife's jointure should continue 300*l.* a-year, the Covenant, being an executory Agreement, was held to be evidence of the several engagements of both Father and Son; and Heirs, being named, were bound, as well as Executors. In *Bishop v. Church*, Lord Hardwicke puts the case upon the ground, that, although the obligation was joint, yet the condition being "if they or either of them should pay," was evidence of a several Agreement. Perhaps this view of these two Cases is hardly to be supported, because it amounts to this, that, upon the whole Instrument, at Law, the Agreement is joint, and in Equity, several. In *Simpson v. Vaughan*, the condition was joint as well as the obligation, and the Court proceeded upon the ground of mistake, simply. In these four cases, the Bonds were filled up by one of the joint Obligors, and there was no other Evidence of mistake than the reasonable presumption arising from the general circumstances of the Case, and the ignorance of the Parties who filled up the Bond. In *Bishop v. Church*, the Bond was filled up by *Bishop*, the Obligee.

1823.

BALL

v.

STORIE.

The VICE-CHANCELLOR:—

If called upon to decide this Case upon the present state of the Record, I should be bound to conclude that the Instrument in question did not legally effectuate the real intention of the Parties, and that it was not the true Agreement, that the Plaintiff should be personally bound for the Sum of 4,000 *l.* which was demanded by the Action at Law. For the purpose of this Injunction, I assume that fact. Then the question is, whether in respect that the Instrument, with the exception of the sixth Clause, was drawn by the Plaintiff himself, who is a professional person, he can be permitted to say, that the Instrument does not contain the true Agreement.

I am very much disposed to adopt the argument at the Bar, that, if the Instrument had been executed as drawn by the Plaintiff, it would not, at Law, have fixed the Plaintiff with the personal obligation to pay the 4,000 *l.* and that the introduction of the sixth Clause, which was not drawn by the Plaintiff, but by the Solicitor to the Defendant, has in truth occasioned the present legal construction of the Instrument. If this be so, then this is reduced to the common case of an Instrument to be reformed in Equity, because the Drawer has, by mistake, miscarried in the expression of the Agreement of the Parties.

If, however, this Case requires the decision of the Court upon the point, whether a Court of Equity will refuse to reform an Instrument which has mistaken the intention of the Parties, because it happened to be drawn by the Party seeking that reformation, I am prepared to give my opinion upon that point. The rule at Law, that evidence is not admissible to contradict or

1823.

BALL
v.
STORIE.

explain a written Instrument, stated, *simpliciter*, is received in Equity as well as at Law. A Court of Equity does, nevertheless, assume a jurisdiction to reform Instruments, which, either by the fraud or mistake of the Drawer, admit of a construction inconsistent with the true Agreement of the Parties. And, of necessity, in the exercise of this jurisdiction, a Court of Equity receives evidence of the true Agreement in contradiction of the written Instrument. If the true Agreement and the consequent mistake in the written Instrument be established by the evidence, can a Court of Equity refuse relief, because it appears, that the Party seeking relief himself drew the Instrument; unless it be a principle in a Court of Equity, not to relieve a Party against his own mistakes.

There is no such principle in a Court of Equity. Common mistake is the ordinary head of jurisdiction; and every Party who comes to be relieved against an Agreement which he has signed, by whosoever drawn, comes to be relieved against his own mistake.

In *Bishop v. Church*, the Bond was drawn by the Oblige, in whose favour it was established to be several as well as joint. If, therefore, this Instrument had been wholly drawn by the Plaintiff, I should still have been of opinion, that the Injunction must be continued.

1822.

13th and 20th
November, and
5th December.

*Plea of Outlawry.
Practice.*

A Plea of Outlawry, to which neither an Office Copy of the Record of the Outlawry, nor of the *Capias Utlagatum* was annexed, but only a Certificate from the Clerk of the Outlawries, was held to be bad; but leave was given to amend it, because the defect was caused by a mistake of the Clerk of the Outlawries, and not of the Defendant, and did not affect the substance of the Plea.

WATERS v. MAYHEW and others.

THE Bill in this Cause prayed for an account of the Monies produced by the sales of certain real Estates, which had been sold by the Defendants, under a conveyance made to them, by the Plaintiff, for that purpose. To this Bill the Defendant, *Mayhew*, put in the following Plea:

“ This Defendant not confessing, &c. saith that the said Complainant now is and standeth a person outlawed, and is thereby disabled by the Laws of this Realm to sue or commence any Action or Actions, Suit or Suits in this honourable Court, or in any other Court, until the said Outlawry be reversed by due course of Law. For this Defendant saith, that, on Monday next after the Feast of St. John, in the second year of the reign of his Majesty King *George* the Fourth, the said Complainant, by the name of *Edmund Waters*, late of the *Haymarket* in the county of *Middlesex*, Esq. was outlawed in an Action of Trespass on the Case for 300 *l.* at the suit of *R. Hill*, (as by the said Outlawry, *sub pede sigilli*, hereunto annexed appeareth;) and further, that, on Monday next after the Feast of All Saints, in the second year of the reign of his present Majesty, King *George* the Fourth, the said Complainant, by the name of *Edmund Waters*, late of *London*, Esq. was outlawed in an Action of Trespass on the Case for 200 *l.*, at the suit of *Joseph Cooper*, *Joseph Watson*, *Thomas Osborne Stock*, and *Ford Wilson* (as by the said last-mentioned Outlawry, *sub pede sigilli*, hereunto also annexed appeareth) both of which said Outlawries do yet stand and remain in full force and unreversed. And this Defendant doth aver that the

said *Edmund Waters*, the Complainant named in the said Bill of Complaint, and the said *Edmund Waters* named in the Certificates of the said Outlawries, *sub pede sigilli*, hereunto annexed, is one and the same person, and not diverse and several; and therefore this Defendant doth humbly demand the judgment of this honourable Court, whether or no he shall be compelled to make any other or further answer to the said Complainant's Bill of Complaint, until the said Complainant shall have reversed each and every of the said Outlawries, and thereby become a person of ability and capable to exhibit a Bill of Complaint against this Defendant; and, in the mean time, this Defendant prays to be dismissed, &c."

1822.

WATERS
v.
MAYHEW
and others.

The following Certificates were annexed to the Plea :

" *London, June 1821.*

" *Edmund Waters*, late of the *Haymarket*, in the County of *Middlesex*, Esq. outlawed in *London*, on Monday next after the Feast of St. John, before the *Latin Gate*, in the second year of the reign of King *Geo. the 4th*, at the suit of *Richard Hill*.

" *R. Hill*, (l. s.)

Case 3001."

" Examined, *John Young*, Deputy Clerk of the Outlawries."

" *London, November 1821.*

" *Edmund Waters*, late of *London*, Esq. outlawed at the Hustings of Common Pleas, held at the Guildhall in and for the City of *London*, on Monday next after the Feast of All Saints, in the second year of his present Majesty, King *Geo. the 4th*.

1822.

WATERS
v.MAYHEW
and others.

"At the Suit of *Joseph Cooper, Joseph Watson, Thomas Osborne Stock, and Ford Wilson.*

"*Beavan, (L. s.)*

Case 2001."

"Examined, *H. Haines*, Clerk of the Outlawry."

Mr. Hart, Mr. Bell, and Mr. Bridger, for the Plaintiff:—

Formerly it was usual to annex to a plea of Outlawry the whole record of the Outlawry under the seal of the Court from whence it issued. *Co. Litt.* 128, b. *Mitf.* 184. But latterly it has been the practice to annex the *capias utlagatum* only, under the seal of the Court. 1 *Lutwyche*, 6. *Clift's Entries*, 14. 5 *Bac. Ab.* 235. Here there is neither the Record nor the *capias*; but there is only a Certificate, from the Clerk of the Outlawries, that the Plaintiff has been outlawed. It is necessary to have the *capias utlagatum* annexed; for that proves that the person against whom the process issued did not appear before the *exigent* was returned.

If this Outlawry is improperly pleaded, the Defendant cannot be permitted to amend his Plea. Because this is a dilatory Plea; and Pleas of that kind are never allowed to be amended. There is reason to believe that the *capias utlagatum* has never been returned; and therefore this Outlawry is incomplete.

Mr. Heald, for the Defendant:—

Outlawry is pleaded at Law in the same way as it is pleaded in this Case. The seal of the Officer of the Court, is the seal of the Court; and this Certificate is evidence that this Record is complete. The Outlawry is complete before the *capias utlagatum* is sued out; it is the foundation of the *capias*; and that Writ is the fruit

of the Outlawry, and is given for the benefit of the subject after the Outlawry is complete.

1822.

WATERS
v.
MAYHEW
and others.

If it is necessary for us to have an office copy of the *capias*, *sub pede sigilli*, it is not necessary to annex it to the Plea. It may be produced in Court, at any time. It is only said, in the books, that it is *usual* to annex it to the Plea.

The VICE-CHANCELLOR :—

This is a perfect Plea of the Outlawry. But that is not sufficient. There must be evidence of the fact. Formerly the office copy of the Record was required to be annexed to the Plea for that purpose. Afterwards an office copy of the *capias utlagatum* was considered sufficient. And the question is, whether the modern practice has established that a Certificate from the Clerk of the Outlawries is equivalent to the *capias*. Let this Plea stand over till the next day for hearing Pleas and Demurrers, and, in the mean time, let the Register ascertain what is the practice of the Court upon the subject, by referring to the Records; and if it turns out that the *capias utlagatum* ought to have been annexed, I shall permit the Plea to be amended; for the objection that has been raised extends to the form only of the Plea, and does not affect the substance.

This Plea was again called on; but no precedents had been found in support of the practice, as it had been stated by the Defendant's Counsel. Mr. *Heald* said, that he had received a Certificate, stating that what was called the seal of the Court was the seal of the Officer of the Court; and that the Documents annexed to this Plea, were the Certificates usually given in cases of Outlawry. 20th November.

1822.

WATERS
v.
MAYHEW
and others.

The VICE-CHANCELLOR :—

I never can hold the Outlawry in this Case to be properly pleaded, unless this manner of pleading it is shown to have become proper by inveterate practice. If that is not shown, I must hold this Plea to be bad, for want of judicial evidence of the Outlawry. But, as it would be hard that this Defendant should be deprived of his rights by the mistake of the Officer of the Court to whom he applied, I shall permit him to move to amend his Plea, on first giving notice of the Motion to the Plaintiff.

5th December.

Mr. *Heald* moved, that the Defendant might be at liberty to withdraw his Plea filed in this Cause, and to amend it by annexing an office copy of the *exigent*, or record of the Outlawry, upon which the Plaintiff was declared an Outlaw.

Mr. *Bell* opposed the Motion and said, that a Plea of Outlawry was not a Plea to the merits of the Case ; but the effect of it was only to suspend the Cause until the Outlawry was reversed ; and that it was the rule of the Courts, never to give any indulgence to a plea which did not meet the merits of the Case.

The VICE-CHANCELLOR :—

If the defect of this Plea had been caused by the negligence or inattention of the Defendant, I would not have allowed him to amend it ; but that was not the case ; for this informality was occasioned by the error of a public officer to whom the Defendant applied in order to do what was right upon the occasion. It is now found that the Clerk of the Outlawries was mistaken, and I must, therefore, relieve the Defendant from the error which he has been led into by the mistake of that public officer.

Motion granted.

WATERS v. CHAMBERS.

IN this Case, the Defendant, *Chambers*, had put in a Plea of Outlawry after an Attachment had issued against him for want of an Answer. Mr. *Hart*, Mr. *Bell*, and Mr. *Bridger*, for the Plaintiff, now moved that the Plea might be taken off the File. They said that a Plea of Outlawry was a dilatory Plea; and that, upon the principle established by the Case of *Curzon v. Lord De La Zouch* (a), such a Plea could not be filed by a Defendant who was in contempt.

Mr. *Heald* and Mr. *Rose* opposed the Motion.

The *Vice-Chancellor* said, that he had consulted the Register, Mr. *Walker*, and was of opinion that a Plea of Outlawry might be filed after an Attachment had issued.

1822.
14th December.

1823.
20th March.

Plea of Outlawry.
Practice.

A Defendant against whom an Attachment was issued for want of an Answer, may file a Plea of Outlawry.

SANDERS v. MURNEY.

AN Attachment with Proclamations had issued against the Defendant, for not putting in his Answer to the Bill. After the day on which the Attachment with Proclamations was returnable, the Defendant put in a Plea and Answer, without having obtained the leave of the Court for that purpose. It did not appear that the Writ had been actually returned, before the Plea and Answer were filed.

Mr. *Lowndes*, for the Plaintiff, now moved that the Plea and Answer might be taken off the File. He said,

1823.
8th & 20th
March, and
17th April.

Plea & Answer.
Practice.

A Defendant against whom an Attachment with Proclamations has issued, may put in a Plea and Answer, if the Writ has not been returned, but cannot do so if the Writ has been returned.

(a) 1 Swans. 185.

1823.

SANDERS
v.
MURNEY.

that a Defendant could not put in a Plea and Answer, after an Attachment with Proclamations had issued against him, without having previously obtained the leave of the Court; and he cited *Beames's Ord. Chan.* 178. *Gilb. For. Rom.* 71, 72. "The reason why, upon the first contempt on the Attachment, they allow a Commission to issue, or a Plea or Demurrer to be put in, is because it does not appear to be an affected delay; and, therefore, upon tendering the Costs of the Attachment, the Defendant may take his Commission; and, upon like tender, the Plea and Demurrer are to be received. But, if there regularly issues an Attachment with Proclamations, the Defendant cannot of course purge his contempt by a mere tender; but he must apply to the Court to show that his Plea and Demurrer are proper, and to exhibit a proper excuse for his delay, that the Court may see that there is no further likelihood of delay by the Plea or Demurrer put in, or by the commission to answer granted." *Lloyd v. Gunter* (a), *Newton v. Dent* (b).

Mr. *Spence*, for the Defendant, admitted, that, if the Attachment with Proclamations had been actually returned, the Defendant could not have filed a Plea and Answer; but he said that the Defendant was at liberty to file the Plea and Answer before the Attachment with Proclamations was returned.

THE VICE-CHANCELLOR:—

I will consult the Register about this Motion. The question here is, whether, in order to make the proceeding which is complained of irregular, the Attachment with Proclamations must not be returned. In *Newton v. Dent*, the Sheriff had returned *cepi corpus*.

(a) 1 Vern. 275.

(b) 1 Dick. 234.

The VICE-CHANCELLOR:—

1823.

SANDERS
v.

MURNEL.

17th April.

The question, whether this Plea and Answer were regularly filed, depends on the Orders of Lord *Clarendon* and Sir *Harbottle Grimston*; which express, "that, after a contempt duly prosecuted to an Attachment with Proclamation returned; no Plea or Demurrer shall be admitted, but upon Motion in Court (c)." This Order is confirmed by the practice of the Court, and by the Case which has been cited from *Dickens*. If, therefore, this Plea and Answer were filed after the Attachment with Proclamations was returned, they are irregular; if before, they are regular. As it does not appear that the Writ had been returned in this Case, when the Plea and Answer were filed, I must hold them to have been regularly filed, and must refuse this Motion.

HOOK v. DORMAN.

1823.

5th February,
30th April, and
5th May.

THE Bill prayed that the Defendant, *Elizabeth Dorman*, might be decreed to deliver to the Plaintiffs possession of certain Messuages and Hereditaments, to account for the Rents and Profits, and to deliver up all the Title Deeds relating to the Estate in question, or, otherwise, that the Plaintiffs might be at liberty to proceed at Law for the recovery of the Estate, and that the Title Deeds relating to it, in the possession of the Defendant, might

Plea. Demurrer.

To a Bill for the Delivery of Title Deeds, and for an Injunction to restrain the setting up of outstanding Terms, to which no Affidavit as to the Title Deeds

was annexed, the Defendant pleaded that there were no outstanding Terms: Plea overruled, because it ought to have been confined to so much of the Bill as related to the outstanding Terms, and because that part of the Bill which related to the Title Deeds ought to have been demurred to, for want of the Affidavit.

A Defendant who has pleaded to a Bill cannot demur *ore tenus* to it, on his Plea being overruled; because there is no Demurrer on the Record.

(c) See Beames's Ord. Chan. 178.

1823.

Hook
v.

DORMAN.

be produced at the trial of the Action, and the Defendant be restrained, by Injunction, from setting up any legal Estate or outstanding Terms in bar of the Action.

The Case made by the Bill was, that *Charles Sharp*, being seised in fee of twelve messuages at *Crayford*, and of two houses at *Dartford*, in *Kent*, by his Will, dated in 1772, devised six of these messuages (subject to an Annuity) to his daughter *Elizabeth Sharp*, in fee, and the other six messuages to his daughter *Sarah Sharp* in fee; and the two houses, to his daughters *Elizabeth* and *Sarah*, as tenants in common in fee. The Testator died in 1775, and both his daughters survived him. *Sarah Sharp* married *William Pope*, and *Elizabeth* married *John Dorman*. In 1779 *William Pope* and *Sarah* his wife concurred in levying a fine of the six messuages of which he was thus seised in her right, and a Deed was executed by all necessary Parties, by which it was declared that the fine should enure to the use of *William Pope*, and *Sarah* his wife, for their joint lives, and the life of the survivor, with remainder to the use of *William Pope*, his heirs and assigns, for ever. In 1782, *William Pope* purchased from *John Dorman*, and *Elizabeth* his wife, their interest in the two houses at *Dartford*; and, accordingly, in Hilary term 1782, *John Dorman* and *Elizabeth* his wife concurred in levying a fine of their interest in these two houses; and by a Deed executed by all the necessary Parties, it was declared that this fine should operate to the use of *William Pope* and *Sarah* his wife, for their lives, with remainder to *William Pope*, his heirs and assigns. The Bill stated, that the Plaintiffs were unable to set forth, more particularly, the contents of these Deeds declaring the uses of the fines thus levied; inasmuch as they were in the possession of the Defendant. *William Pope* died in 1786, and *Sarah Pope* in 1820.

The Plaintiff claimed, as the heir at law of *William Pope*, to be entitled to the six messuages at *Crayford*, and the two houses at *Dartford*; but the Bill alleged that *Elizabeth Dorman*, who had survived her husband, entered into possession of these messuages and houses immediately on the death of *Sarah Pope* in 1820; and also got possession of the Deeds declaring the uses of the fines; and that she now claimed to be entitled to these messuages and houses, as heir at law to her sister, *Sarah Pope*. The Bill charged, that these Deeds were still in the possession of *Elizabeth Dorman*; and that, if they were produced, it would appear that the Plaintiffs were entitled to the messuages and houses, but that *E. Dorman* refused to produce them; and that she had procured certain terms of years in the property in question, created by *Charles Sharp*, the Testator, or by some prior owner, and which had been vested in Trustees to attend the inheritance, to be assigned to some person in trust for her; or that the legal fee was outstanding in some Trustee, and that she threatened to set up either these Terms, or the legal Estate, in any Action commenced by the Plaintiffs to recover the possession of the property.

1823.
HOOK
v.
DORMAN.

No Affidavit as to the Title Deeds was annexed to the Bill.

The Defendant pleaded, to the whole of this Bill, that no terms for years or legal fee in the messuages and premises mentioned in the Bill, or any of them, were then subsisting or outstanding.

Mr. *Pepys*, for the Plea:—

This Plea goes to the whole relief prayed by the Bill, and therefore extends to all the discovery. This is a mere fishing Bill; and it is plain that the allegation

1823.

HOOK
v.
DORMAN.

as to Title Deeds, is not the circumstance on which the Plaintiffs found their claims to relief. Admitting the case of *Barker v. Ray* (a), yet it must be allowed that a Defendant is exposed to great hardship, if a Plea of this kind is not held to cover the whole Bill; because the Allegation of outstanding Terms runs through the whole Bill, and is the foundation of the Equity claimed by the Plaintiffs. Nor is this a Case in which the Defendant can split his Defence, and demur to part of the Bill and plead to the rest; because a Demurrer admits the Allegations to be true. At any rate, this Plea may be allowed as to so much of the Bill as seeks for relief against outstanding Terms.

The *Vice-Chancellor* suggested, that the Defendant might have demurred to so much of the Bill as related to the Title Deeds, on the ground that no Affidavit was annexed.

Mr. *Pepys* claimed the right to demur, *ore tenus*, to that part of the Bill.

Mr. *Hart* and Mr. *Pemberton*, for the Bill, insisted that the Plea, though expressed to be a Plea to the whole Bill, extended, in fact, only to one part of the Case, and left the Allegation as to Title Deeds untouched, and therefore that it must be overruled.

The VICE-CHANCELLOR :—

The Plea insists that the single fact that there is no outstanding Term, is an Answer to the whole Equity of the Plaintiff's Bill. This is plainly erroneous; for if the Allegation be true, that the Defendant has possession

(a) 5 Madd. 64.

1823.

HOOK
v.
DORMAN

of the Plaintiff's Title Deeds, that fact alone would entitle the Plaintiff to the whole Relief and Discovery sought by the Bill. The Defendant's Counsel insist that they have a right to state, at the bar, in the nature of a Parol Demurrer, that the Plaintiff has annexed no Affidavit to his Bill of the loss of his Title Deeds, and that he can, therefore, found no claim to the interference of a Court of Equity on that ground. But if it were true that such a Parol Demurrer would hold in this case, that would not make the Plea good in form; for the language of the Plea insists that the single fact that there is no outstanding Term, is alone an Answer to the whole Equity of the Plaintiff's Bill, without reference to the additional circumstance that there is no Affidavit annexed to the Bill.

I am of opinion, however, that a Parol Demurrer will not hold in this Case. Where a Defendant puts in a written Demurrer to a Bill, he may assign, at the hearing, a new cause of Demurrer by Parol; but where there is a Plea only, and no Demurrer upon the record, he cannot demur by Parol. The Defendant here ought to have confined his Plea to the whole Discovery and Relief sought by the Bill, so far as it was founded upon the Allegation of outstanding Terms, and ought also to have demurred to the whole Discovery and Relief sought by the Bill, so far as it was founded upon the Allegation of loss of Title Deeds, because no Affidavit was annexed.

Plea overruled.

1823.
11th and 19th
February.

PACKWOOD v. MADDISON.

Trustee.—Costs.

A Person to whom a Legacy was assigned upon certain Trusts, having filed a Bill against the Executors to recover the Legacy, notwithstanding he had Notice of a subsisting Suit and Decree for administering the Assets, the Court refused to allow the Legacy to be paid over to him, because he had acted improvidently, or to give him his Costs; and it also refused to give the Executors their Costs, because they had answered the Bill, instead of moving to stay Proceedings in the Suit.

ANN BRIMYARD, by her Will, bequeathed to *Mary*, the wife of *Edward Price*, "the sum of 300 *l.* to be secured by Annuity for the support of *Mary Price*, and a further 50 *l.* for her present use."

The Testatrix died in 1820. *Edward Price* and *Mary* his wife, were indebted to *Packwood*, an Attorney, in the sum of 28 *l.* at the time of the death of the Testatrix; and, by an Indenture, dated the 3d August 1821, and made between *Price* and his wife of the one part, and *Packwood* of the other part, after reciting the Bequest of the 300 *l.* and the Debt of 28 *l.* due to *Packwood*, and that *Price* was indebted to *Packwood*, for business done as his solicitor; *Price* and his wife assigned all their interest in the 300 *l.* to *Packwood*, in trust to place it out on proper security, in his name; and, out of the Dividends or Interest, to pay himself the 28 *l.* and any other Sum due to him by them, to the extent of 100 *l.*, together with all the Costs of recovering or compelling payment of the 300 *l.*, and, subject thereto, to pay the Interest and Dividends to *Mary Price*, for life, for her separate use, and after her death to her husband for life, and after the death of the Survivor, to pay the Interest to their Children, share and share alike.

When this Deed was executed, *Packwood* gave notice of it to the Executors of *Mrs. Brimyard*, and filed the present Bill, stating the Legacy and the Assignment to him on the Trusts of the Deed, and praying that the 300 *l.* might be paid to him on these Trusts; and in case the Executors did not admit Assets, that an Account of the Testatrix's Estate might be taken in the usual

manner, and, if necessary, that an Account might be taken of what was due to himself by *Price* and his wife.

1823.

PACKWOOD
v.
MADDISON.

This Bill was filed by *Packwood*, and by Mrs. *Price*, by *Packwood* as her next friend, against *Edward Price*, the husband, and his children (who were Infants), and also against the Executors of Mrs. *Brinyard*.

The Executors, by their Answer, stated, that immediately after the death of the Testatrix, they had found it necessary, in consequence of some difficulties as to the construction of the Will, to institute a Suit for performing the Trusts of the Will; that a Decree had been obtained for that purpose, before the present Bill was filed; that *Packwood* had Notice of the other Suit and of the Decree before he filed the present Bill, and that he might have had the same benefit under it as he now prayed for. The 300 *l.* was paid into Court, under an Order obtained on Motion.

The Cause now came on to be heard.

Mr. *Rose* for the Plaintiff.

Mr. *Parker* for *Price* and his Children.

Mr. *Latham*, for the Executors, insisted that the present Suit was wholly unnecessary, and that, by a Petition in the former Suit, the object of the Plaintiff might have been effectually attained, and a great deal of expense saved to the Estate.

The VICE-CHANCELLOR:—

The Legacy, though for the support of the wife, is not to the separate use of the wife, and it passed by the Assignment to the Plaintiff *Packwood*. He is, there-

19th February.

1823.

PAOKWOOD

v.

MADDISON.

fore, entitled to be paid out of the Dividends what is due to him under the Assignment; and the ordinary Decree would be, to direct the *Master* to ascertain how much is due to him. But I hope that the Parties will find means to settle among themselves how much is due, and not aggravate the expenses already unnecessarily incurred by the expense of such an inquiry. I shall, therefore, direct the *Master* to ascertain how much is due, in case the Parties do not agree as to the amount. The Executors, instead of putting in an Answer to this Bill, ought to have moved to stay Proceedings in the Suit, and thus have prevented an unnecessary expense; because they have not done so, I must refuse to give them their Costs. I cannot give the Plaintiff his Costs; because the Suit is unnecessary for the due execution of his Trust; and I cannot allow the 300*l.* to be paid to him, because I consider him an improvident Trustee. The Fund must remain in Court, and I shall direct the Accountant-General, after satisfying out of the Dividends what shall appear to be due to the Plaintiff, to pay the residue of the Dividends to the *feme covert* for her life, with liberty for the Parties interested to apply at her death.

Butcher v. H. Co. 29d C. 310 -

WHARTON v. WHARTON.

1823.
5th February.

IN this Case the Plaintiff excepted to the Answer of the Defendant for insufficiency. One of the interrogatories in the Bill was, "whether, upon or subsequent to the Marriage of *Thomas Wharton*, the Intestate, with the Defendant, *Mary Wharton*, some Deeds or Instruments, Deed or Instrument, by way of Settlement, or otherwise, were not, or was not made and executed, whereby, or by means whereof property to a considerable, and what amount, and, amongst other property, part of the real Estate of *Miss Mitchell* was, or not, settled upon the Defendant *Mary Wharton*, in lieu or in bar of Dower of the said Intestate's real Estate, or how otherwise?"

Pleading.

A general Answer, even where it includes an Answer to all the particular charges, is insufficient; therefore where the Bill asked, whether, on the Marriage of *W.* a Settlement of part of the Property of *M.* was not executed, an Answer that no Settlement of any Property was executed at the Marriage of *W.* was held insufficient.

The Answer was, "that the Defendant denied that, upon or subsequent to the Marriage of the said Intestate with the Defendant, *Mary Wharton*, any Deeds or Instruments, or Deed or Instrument, by way of Settlement, or otherwise, were or was made or executed, whereby, or by means whereof, property to any amount was settled upon her, the Defendant, in bar or in lieu of Dower of the said Intestate's real Estate, as in the Bill mentioned."

The *Master* reported that this Answer was sufficient, and the Plaintiff excepted to the *Master's* Report. The Exception now came on to be argued.

Mr. *Raithby*, for the Exception, insisted on the rule, that a general Answer to a particular Charge is insufficient, and referred to *Lord Bacon's* Order on this point,

1823.

WHARTON

v.

WHARTON.

Beames's Orders, 28. and also to Lord *Clarendon's Order*,
Ibid. 179. *Mitf.* 250.

Mr. *Merivale*, for the Defendant, argued that the question as to the sufficiency of such an Answer must be decided on a view of the whole Case; and that, if the Court, or the *Master*, should be of opinion, that the Answer was such as to satisfy common sense, it would be considered as sufficient; if it were not so, the Answer must often be impertinent. If the Bill charged that a person died at a certain place, on a certain day, it must be a sufficient Answer to state that the Person was now living. *Hall v. Noyes* (a), *Shepherd v. Roberts* (b), and the other Cases in which the rule, that a Defendant must answer as to all the particulars charged, did not govern such a Case as the present.

The VICE-CHANCELLOR :—

It is true that the general Answer in this case, includes in it an Answer to the particular Inquiry. But such a mode of answering may, in some cases, be resorted to, in order to escape from material discovery; and it is more safe to adhere in all cases, to the general rule, that particular Charges must be answered particularly and precisely.

Exception allowed.

(a) 3 Bro. C. C. 483.

(b) 3 Bro. C. C. 239.

DIX v. REED.

1823.
11th February.

THIS Case was heard on an Exception to the *Master's* Report; and the question was, whether *Thomas King* was entitled to a Legacy of 50*l.* reported to be due to him.

*Legacy to
Executor.*

The Suit was instituted for the purpose of establishing the Will of *Robert King Bird*; and for an account of the Testator's personal Estate. The Testator by his Will expressed himself as follows: "To *William Reed* and *John Baugley*, I give 50*l.* each, whom I nominate and appoint Executors in Trust to this my Will; the said Bequests to be upon condition of their taking upon them the Trust hereinafter mentioned; that is to say, I give, devise and bequeath unto my friends *William Reed* and *John Baugley* upon Trust, for the use and benefit of my son *Charles Clarke Dix*, all my Freehold Estate in the Parish of *Almondsbury*, County of *Gloucester*, to hold to him, his Heirs, Executors and Administrators." After giving various other Legacies, the Testator proceeds thus: "I give unto my cousin *Thomas King*, the sum of 50*l.* whom I appoint as joint Executor in Trust in this my Will." And in case of the death of *Charles Clarke Dix*, under twenty-one without issue, the Testator devised the Freehold Estate in the Parish of *Almondsbury*, to his cousin *Thomas King*, his Heirs, Executors, Administrators and Assigns, subject to an Annuity of 30*l.* payable to *Ann* and *Mary King*, the sisters of *Thomas King*. In another part of the Will, the Testator gave them Legacies of 50*l.* each.

Testator named two persons to be his Executors, and bequeathed to them 50*l.* each, upon condition of their taking upon themselves a certain Trust, and afterwards used these words, "I give to my Cousin, *T. K.*, 50*l.*, whom I appoint joint Executor;" and the Testator also gave to *T. K.*'s sisters, Legacies of 50*l.* each: Held, that the Legacy to *T. K.* was not annexed to the office of Executor, and that he was entitled to it, although he had declined to act in the Trusts of the Will.

1823.

DIX
v.
REED.

Reed and *Baugley* proved the Will, but *King* declined to prove it, and never interfered in the execution of the Trusts. It was, therefore, insisted, that he was not entitled to the Legacy of 50*l*. The *Master* having reported this Legacy to be due, this Exception was taken to that part of the Report.

Mr. *Horne*, Mr. *Martin*, and Mr. *Rose*, in support of the Exception, cited *Stackpoole v. Howel* (a), *Read v. Devaynes* (b), and the note to that case in Mr. *Bell's* edition of *Brown's Chancery Reports*. The Testator seems to have united the two offices of Executor and Trustee; and a person who has assumed neither of these offices, cannot be entitled to a Legacy, which must be considered as annexed to the office.

Mr. *Cooke* against the Exception:—

Thomas King did not take this Legacy in his character of Executor. In the bequest to the two first Executors, who were strangers in blood to the Testator, he expressly annexes the condition that they should execute a certain Trust; but no such condition is annexed to the gift to *Thomas King*. On the contrary, the words used in giving the Legacy to him are, "to my cousin, *Thomas King*." The motive of the gift was the relationship, and not the office; for *Ann* and *Mary King*, his sisters, who were related in the same degree to the Testator, have Legacies of the same amount; and *Thomas King* afterwards has a contingent interest devised to him in the real estate. The Case of *Read v. Devaynes*, is also reported in Mr. *Cox's*

(a) 13 Ves 417.

(b) 3 Bro. C. C. 96. See the note to this Case in Mr. *Eden's* excellent edition of *Brown's Reports*, and the Cases there referred to, and S. C. 2 Cox, 285.

Reports; and it appears there, that, when the Cause came on for further directions, the Court held the Legatee to be entitled.

1823.

DIX
v.
REED.

The VICE-CHANCELLOR:—

I must hold that *Thomas King* is entitled to the Legacy; and consider, that the gift is rather to be intended to be in respect of his relationship, than of his office. The circumstance that the two other Executors have the same Legacies, cannot be brought in aid of the Exception; because those Legacies are expressly annexed to the office of Trustees of the real estate.

I consider the Case, however, to be very doubtful. *Prima facie* Legacies to Executors are considered as annexed to the office, and they are to show circumstances to repel the presumption.

Exception overruled.

DUFFIELD v. ELWES.

Wheeler & Warner
Act 304

1823.
12th February
and 28th June.

THIS Suit was instituted for the purpose of having the rights and interests of various persons, under the Settlement and Will, made by the late *George Elwes*, declared by the Court.

By a Settlement, made in October 1802, *George Elwes* conveyed certain freehold and leasehold Estates

and without his consent, the Trustees should hold the Estates in Trust for him and his Heirs. The Daughter married under twenty-one, and without consent; but *G. E.* was afterwards reconciled to her, and treated both her and her Husband with great kindness: Held, that this conduct of the Father did not divest the equitable Fee which had vested in him on the Marriage.

A Mortgage, or a Bond given as a collateral security for Money due on Mortgage, cannot be made the subject of a *donatio mortis causæ*.

G. E. conveyed real Estates upon Trust for the benefit of his Daughter; but he declared, that, if she married under age,

1823.

DUFFIELD

v.

ELWES.

to Trustees, upon Trust, in the first place, to pay certain Annuities to his wife, and to *Emily Frances Elwes*, his daughter and only child, and subject to those Annuities upon Trust, during the minority of his daughter, and until her coming of age, or her marrying with such consent as therein mentioned, to invest the Rents of the settled Estates in the public stocks, as an accumulating fund, to be laid out in the purchase of land to be settled to the same uses as were declared by this Deed; and, after declaring certain Trusts for the benefit of *Emily Frances Elwes* in case she attained the age of twenty-one years and was then unmarried, it was provided that, in case she should die unmarried in the life-time of *George Elwes*, or should marry under the age of twenty-one and without such consent as therein mentioned, then the Trustees were to hold the Estates in Trust for *George Elwes* and his heirs; but in case she should, at any time, marry with the consent in writing of *George Elwes*, then the Trustees, upon or before the marriage, were directed to settle the Estates, together with that to be purchased by the accumulating fund, upon *Emily Frances Elwes* and the children of such marriage in strict settlement.

In February 1810, *Emily Frances Elwes*, being then under the age of twenty-one, was married, at *Gretna Green*, in *Scotland*, to the Plaintiff, *Thomas Duffield*, without the consent or knowledge of *George Elwes*, her father. Soon after the marriage, Mr. and Mrs. *Duffield* returned to *London*; and, in conformity to a wish expressed by Mr. *Elwes*, were re-married in *London*, by banns. Soon afterwards, Mr. *Elwes* was reconciled to his daughter and her husband, and treated them with great kindness. He took them to reside with him in his own house, as part of his family, and treated them,

1823.

DUFFIELD
v.
ELWES.

in all respects, as having acquired those rights under the Settlement to which they would have been entitled in case they had been married with his consent. Accordingly, Mr. *Elwes*, in September 1811, gave to Mr. and Mrs. *Duffield* possession of the Mansion-house on the settled Estate, together with a part of the Lands, but retained possession himself of the greater part of them. He repeatedly declared that Mr. and Mrs. *Duffield* were entitled to the settled Estates; and, in May 1816, he caused the Title Deeds of those Estates to be delivered to Mr. *Duffield*, with the knowledge of the Trustees. These Deeds, from that time, continued in the possession of Mr. *Duffield*.

On the 2d of September 1821, Mr. *Elwes* died, leaving Mrs. *Duffield* his only child and heir-at-law, and having made his Will, dated in March 1811, by which other Estates were devised for the benefit of Mr. and Mrs. *Duffield* and their children; but nothing was said as to the settled Estates.

In this Suit, Mr. and Mrs. *Duffield* were the Plaintiffs, and their children, together with the Trustees of the Settlement, the Trustees and Executors of the Will, and the Widow of Mr. *Elwes*, were the Defendants. The Plaintiffs insisted, by their Bill, that they were entitled, under the Settlement, and by the consent, conduct, and declarations of Mr. *Elwes*, to the settled Estates.

Mr. *Bell*, Mr. *Sugden*, and Mr. *Longley*, for the Plaintiffs, referred to the conduct of Mr. *Elwes*, as evidence of his subsequent approbation of the marriage; and mentioned those Cases, in which, in the construction of Wills, it had been held, that the subsequent approbation of a marriage was a substantial compliance with

1823.
 DUFFIELD
 v.
 ELWES.

the intention of Testators, so as to entitle the Parties to property devised to them in case they married with consent of Executors (a). The Case of *Arsher v. Pope* (b), and *Pole v. Pole* (c), were mentioned as Cases in which Trusts had been created or altered by the conduct of the Parties.

Mr. Hart, Mr. Horne, Mr. G. Wilson, and Mr. Newland, for the Defendants.

THE VICE CHANCELLOR:—

I cannot consider that the subsequent kind usage of the Father proves his approbation of the marriage. But even his express approbation of the marriage could not divest the equitable Fee; which, by the terms of the Conveyance, vested in the Father, upon the event of the prior marriage without his consent.

The decisions in the Case of Wills have no application here. They proceed upon the principle that the intention of the Testator is substantially complied with. But no such construction can be applied to this Deed.

The Father, by retaining possession of the great bulk of the settled Estate, manifested that he did not consider the Settlement as operative in favour of the Daughter. But even if he had, by mistake, considered the Daughter entitled under the Settlement, the property would not have been bound by it, without a new Conveyance to that effect.

(a) See *Workington v. Evans*, *ante*, and the Cases there cited.

(b) 2 Ves. 523.

(c) 1 Ves. 76.

In this Case, another question arose and was decided by the Court, as to the validity of a *donatio mortis causâ* of certain Mortgages.

1823.

DUFFIELD
 v.
ELWES.

George Elwes was possessed of a Bond for 2,927 *l.* and had, also, a Mortgage, created by a Deed of even date with the Bond, for securing the sum mentioned in the Bond. And he had another Mortgage for 30,000 *l.* On the 1st of September 1821, when he was on his death-bed, so ill as to be unable to write, but of sound and disposing mind, in the presence of three persons as witnesses, he declared that he gave the Bond, and Mortgages, and the Money secured by them, to his daughter *Mrs. Duffield*. A written statement of this declaration was forthwith made and signed by the three persons in whose presence the declaration was made. Very soon afterwards, on the same day, and in presence of the same persons, the Mortgage Deeds and Bond were produced to the Testator, and he was told what they were; on which he desired them to be delivered into the hands of *Mrs. Duffield*. They were accordingly delivered into her hand; and, whilst she held the Deeds, he took her hands between his, in token of having completed the gift, and expressed satisfaction when he had done so. He died on the following day.

It was insisted, by the Bill, that these Mortgages and the Bond passed, by this gift, to *Mrs. Duffield*, as *donationes mortis causâ*.

Mr. Bell, *Mr. Sugden*, and *Mr. Longley*, for the Plaintiffs :—

It is decided that a Bond will pass as a *donatio mortis causâ*. *Snellgrove v. Baily* (*d*), *Gardner v. Parker* (*e*). The gift of a paper containing a cove-

(*d*) 3 Atk. 214.

(*e*) 3 Madd. 184.

1823.

DUFFIELD
v.
ELWES.

nant, is a gift of money secured by the covenant, because it deprives the Party of the means of suing for it. In the case where the Bond accompanies a Mortgage, and both the Bond and the Mortgage Deed are delivered, the Bond draws with it the Mortgage. In such a case, the person to whom the gift of the Mortgage is made would be entitled to retain the Deeds, and no Court of Equity would compel them to be delivered up, or allow any other Party to proceed as if the Mortgage Deeds were lost. As Money which is secured by a Bond, passes by the delivery of the Bond, as a *donatio mortis causâ*; so the delivery of the Mortgage Deeds, for the same purpose, must be considered to have the same effect; and, as the right to make the debtor liable passes with the delivery of the Bond, so the right to make the land liable, passes by the delivery of the Mortgage Deeds. As in the Case of the *Duchess of Buccleuch v. Hoare* (*f*), it was held, that the heir at law of a Testator held Scotch heritable Securities as a Trustee for a Legatee under the Will; so it should be held, in the present Case, that there was a Trust in favour of the donee *mortis causâ*. *Ward v. Turner* (*g*), and *Richards v. Symes* (*h*), in which it was held that the delivery of the Deeds by the Mortgagee to the Mortgagor, cancelled the debt.

The VICE-CHANCELLOR:—

The case of a Bond I consider to be an exception, and not a rule. Property may pass without writing, either as a *donatio mortis causâ*, or by a nuncupative Will, according to the forms required by the Statute. The distinction between a *donatio mortis causâ*, and a nuncupative Will is, that the first is claimed against the

(*f*) 4 Madd. 467.

(*h*) 2 Atk. 319. Barnard. 90.

(*g*) 2 Ves. 431.

Executor, and the other, from the Executor (i). Where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causá*, because it will not prevent the property from vesting in the Executors; and, as a Court of Equity will not, *inter vivos*, compel a Party to complete his gift, so it will not compel the Executor to complete the gift of his Testator. The delivery of a Mortgage Deed cannot pass the property *inter vivos*; first, because the action for the money must still be in the name of the Donor; and secondly, because the Mortgagor is not compellable to pay the money without having back the mortgaged Estate, which can only pass by the Deed of the Mortgagee; and no Court would compel the Donor to complete his gift by executing such a Deed.

1823.
DUFFIELD
v.
ELWES.

As to the Case where a Bond accompanied the Mortgage Deed, I was at first inclined to think that, as the Bond alone, if it had been the only security for the debt, would, under the decisions, have passed as a *donatio mortis causá*, so it would draw after it the Mortgage, as being a collateral security for the same debt; but, upon further consideration, I think that the delivery of the Bond, where there is also a Mortgage, cannot be considered as a gift completed. The Mortgagor has a right to resist the payment of the Bond, without a re-conveyance of the Estate; and it cannot be maintained that the Donor of the Bond would be compelled to complete his gift by such re-conveyance. The Case of the *Duchess of Buccleuch v. Hoare*, where I held, that a gift by will of an English Bond was a gift also of a Scotch heritable Security for the same debt, does not apply to this Case. There the single question was,

(i) It is said in 3 P. W. 356, that a *donatio mortis causá* operates as a declaration of trust upon the Executor.

1823.

DUFFIELD
v.
ELWES.

whether the gift of the English Bond was not, within the intention of the Testator, a gift of the debt, and did not necessarily carry with it all securities for the debt. The question here is, not as to the intention to give, but whether the gift be completed. I think the gifts were not completed; and must declare, that there was no good *donatio mortis causâ* of these Mortgages, even in the case where the Mortgage was accompanied by a Bond.

1823.

21st February.

BLAND v. WINTER.

Bond.—Parties.

To a Bill filed by an Obligee of a joint and several Bond for payment of his Debt, all the Obligors must be made Parties.

THIS Bill was filed by the Obligee of a joint and several Bond, against the personal representative of one of the Obligors, for an account of assets, and to obtain payment of the Bond. The other Obligor was alive, but was not made a Party to the Suit; and, when the Cause came on to be heard, the question was, whether the other Obligor ought to have been made a Party.

The Plaintiff, *Susannah Bland*, on the 6th March 1808, was possessed of the sum of 925*l.* three per cents, which, on that day, she transferred to *Robert Winter*, the younger, by way of Loan, on his Father, *Robert Winter*, the elder, agreeing to join with him in executing a Bond to the Plaintiff, to secure the re-transfer of that sum. Accordingly, *Robert Winter*, the elder, and *Robert Winter*, the younger, on the same day, executed a joint and several Bond to the Plaintiff for 1,200*l.* conditioned for the re-transfer of the 925*l.* three per cents, on the 6th March 1809, and for payment, until the re-transfer, of Interest equal to the Dividends on the Stock, at such times as the Dividends would have been payable.

Robert Winter, the elder, after the execution of this Bond, conveyed away the greater part of his real and personal Estate to his Son, the Defendant, *William Leyton Winter*, and died in 1820, having made his Will, by which he bequeathed all his Estates, real and personal, to the Defendant, *William Leyton Winter*, and made him sole Executor. The Testator's personal Estate was insufficient for the payment of his Debts; and the Bill sought to set aside the Conveyances to the Defendant, as fraudulent. The Answer denied the validity of the Bond, as against *Robert Winter*, the elder.

1823.
BLAND
v.
WINTER.

The Cause now came on to be heard, and in support of the objection before mentioned, Mr. *Horne* and Mr. *Pemberton* contended, that the object of this Suit being to make the Assets of *Robert Winter*, the elder, liable, and the Bond being joint and several, *Robert Winter*, the younger, ought to have been a Party; because he had a manifest interest in the defence of the Suit, and because it was the interest of the present Defendant that he should be made a Party. For if the Plaintiff was entitled in Equity, to have the Bond paid, the present Defendant was entitled to call upon *Robert Winter*, the younger, to pay his proportion. If it were the case of a Surety, it is quite clear he must have been made a Party. It is laid down expressly, in *Cockburn v. Thompson* (a), that the general rule is, that a Plaintiff suing on a joint and several Bond, must make all the Obligors Parties, and that the only exception is, where a Co-obligor is a mere Surety, and insolvent, or where the demand must be restrained to the Principal. *Madox v. Jackson* (b), is to the same effect; and the same rule is there laid down, though that Case

(a) 16 Ves. 326.

(b) 3 Atk. 406

1823.

BLAND
v.
WINTER.

was decided on particular circumstances. It is true that *Collins v. Griffith* (c), is a Case where a different doctrine was held. But in *Angerstein v. Clarke* (d), Lord *Thurlow* had occasion to consider both those Cases, and he adhered to the decision in *Madox v. Jackson*, thereby overruling *Collins v. Griffith*. The present is a much stronger Case.

Mr. *Bell* and Mr. *Combe*, for the Plaintiff:—

It cannot be held that the Co-obligor is a necessary Party in this Case. This is a mere Action at Law turned into a Bill in Equity for the administration of Assets. *Haywood v. Ovey* (e), and *Collins v. Griffith* (f), and the Cases mentioned in 1 Eq. Ca. Abr. 93, are authorities to show that the objection now taken, that *Robert Winter*, the younger, is a necessary Party to this Suit, is not valid, and ought not to prevail.

The *Vice-Chancellor* ruled, that Co-obligors, being all Principals, must be brought before the Court upon a Bill by the Obligee.

(c) 2 P. W. 313.
 (d) 2 Dick. 738.

(c) 6 Madd. 113.
 (f) 2 P. W. 313.

ADAMSON v. HULL.

THERE were two Plaintiffs in this Case; and, before the Answer was filed, one of them died. The Defendant now moved, that the surviving Plaintiff might be ordered to file a Supplemental Bill within a limited time, in order to bring before the Court the personal representative of the deceased Plaintiff, and, in default of his so doing, that the Bill might be dismissed.

Mr. *Pemberton*, for the Motion, stated, that the Defendant could not file his Answer to the Bill, because the Suit had abated by the death of one of the Plaintiffs; nor could he move to dismiss the Bill for want of prosecution, because the Answer was not filed. The whole Suit was abated by the death of one of the Plaintiffs.

Mr. *Koe* opposed the Motion, as being contrary to the practice of the Court.

The *Register*, (Mr. *Walker*) being referred to, said, that the whole Suit was abated by the death of one of the Plaintiffs; and that on inquiry he had been unable to find any precedent for such an Order as that now moved for.

The *Vice-Chancellor*, therefore, refused the Motion.

1823.
14th and 28th
February.

Practice.
Abatement.

Where one of two or more Plaintiffs dies before an Answer is put in, the Suit is abated, and the Defendant cannot move that a Supplemental Bill be filed within a limited time, as in the case of a Plaintiff becoming Bankrupt.

1823.
10th February.

GREEN v. OTTE.

*Equity of a Feme
Covert against
her Husband's
Assignees.*

A Divorce obtained by a Wife after her Husband's Bankruptcy does not entitle her in Equity to the whole of a Fund bequeathed to her, which came into possession after the Bankruptcy; although no Settlement was made upon her at her Marriage, and her Husband at that time received 1,500*l.* Stock in her right.

Upon a reference to the Master to approve of a proper Settlement upon the Wife, out of a Fund accruing in her right, which was claimed by the Assignees of her Husband, the Court directed the Master to have regard to the extent of the Fortune received by her Husband in her right, as well as to any other Settlement which he might have made on her.

THIS was a Bill, by the Assignees of a Bankrupt, for payment of a Legacy to which the Bankrupt was entitled, in right of his wife, but the whole of which the wife claimed.

Mary Knapp, who died in November 1813, bequeathed to Trustees the sum of 4,000*l.* four per cent Bank Annuities, upon Trust, to pay the Dividends to *Elizabeth Duncan* for life, and on her death to pay 8,000*l.*, part of the 4,000*l.*, to the Testatrix's niece, *Susannah*, the wife of *James Maund*, "to become her's absolutely." The Trustees paid the Dividends to *Elizabeth Duncan* accordingly. In February 1820, a Commission of Bankrupt issued against *James Maund*, and the Plaintiffs in this Suit were the Assignees of his Estate. In May 1821, *Elizabeth Duncan* died. This Bill was filed in consequence of the Trustees refusing to transfer the 3,000*l.* to the Assignees, and in consequence of *Susannah Maund*, the wife of the Bankrupt, claiming to be entitled to it for her separate use. The Bill charged, that a sufficient provision was made for *Susannah Maund*, and that *Elizabeth Duncan* had bequeathed to her the residue of her Estate for her separate use, and that this residue was of the value of 3,000*l.*

Mrs. *Maund* insisted, in her Answer, and proved by Evidence in the Cause, that she had married the Bankrupt in 1805, being then only eighteen years of age, and entitled to 1,500*l.* three per cent stock, which was

directed the Master to have regard to the extent of the Fortune received by her Husband in her right, as well as to any other Settlement which he might have made on her.

transferred to *Maund* on the marriage; that no Settlement had been made upon her; that in December 1821 she obtained a Decree of Divorce against her husband in the Ecclesiastical Court, on the ground of adultery and ill treatment; that a disease was communicated to her by her husband soon after the marriage, under which she laboured for many years, and by which her health was now so much impaired, that she required frequent medical advice and attendance; and that, on account of her husband's bankruptcy, she was unable to obtain from him any allowance for her maintenance. She admitted that her mother had bequeathed some property for her separate use, but denied that it was to the amount of 3,000*l.*; and insisted that the 3,000*l.* which she now claimed in addition to the property to which she was entitled under the Will of her mother (and which, it appeared, did not produce above 160*l.* a-year), was necessary for her maintenance. There was no issue of the marriage, and the proceedings for the Divorce were commenced after the Bankruptcy.

1823.

GREEN
v.
OTTE.

Mr. Heald and *Mr. Wakefield*, for the Plaintiffs, suggested that the proceedings in the Ecclesiastical Court, which were not commenced until after the Bankruptcy, were collusive, for the purpose of founding the claim now made by the wife. As this Legacy was not given to the separate use of the wife, there is nothing in the case to distinguish it from the class of Cases which establish the doctrine, that the wife is not entitled, as against the Assignees of her husband, to have the whole of a fund which falls into possession in her right after the Bankruptcy; but is only entitled to have a portion of the fund settled on her. All the leading Cases were examined in the Case of *Beresford v. Hobson* (a).

(a) 1 Madd. 362.

1823.

GREEN
v.
OTTE.

Mr. *Parker* for the Bankrupt.

Mr. *Girdlestone* for the Trustees.

Mr. *Bell* and Mr. *Pemberton* for the Wife:—

This is one of those Cases in which the facts are so strong, as to exclude the husband or his Assignees from any claim to the fund. The wife being an infant at the time of the marriage; no Settlement made upon her; all the property to which she was then entitled paid over to her husband, and spent by him; the treatment she has received from her husband; the state of her health; her being now actually divorced from him on account of his conduct, and having no adequate provision for her maintenance—are such facts as must distinguish this from the other Cases. In *Oxenden v. Oxenden* (b), the Court, on the ground of the cruelty and misconduct of the husband, decreed the whole Interest of a fund to the wife, for her maintenance. The same thing was done, for the same reason, in *Williams v. Callow* (c). In *Watkins v. Watkins* (d) the same principle was acted upon, although the charge of adultery was retorted against the wife. *Wright v. Morley* (e), *Guy v. Pearkes* (f), and *Atherton v. Nowell* (g), are Cases in which the Court has maintained the same doctrine.

The *Vice-Chancellor* said he was of opinion, that if separation and divorce from the husband could, in any case, give a special equity to the wife, it would not affect this case; because the whole proceeding was

(b) 2 Vern. 493. S. C. Pre. Cha. 239.

(c) 2 Vern. 752. See also *Nicholls v. Dawvers*, 2 Vern. 671, in which Case there had been proceedings against the husband in the Ecclesiastical Court, *propter sævitiam*.

(d) 2 Atk. 96.

(e) 11 Ves. 12; and see Roper on Husband and Wife, 1st Vol. 275.

(f) 18 Ves. 196.

(g) 1 Cox, 229.

subsequent to the Bankruptcy, and, consequently, after the right to the Legacy had vested in the Assignees; and that there must be a Decree for a reference to the *Master* to approve of a proper Settlement upon the wife.

1823.

GREEN
v.
OTTE.

A question was afterwards raised, whether, in the Decree for a reference to the *Master* to approve of a proper Settlement to be made upon the wife out of the 3,000*l.*, there should be a direction to the *Master* to have regard to any other property which the husband might have possessed in right of his wife?

26th March.
30th April.

Mr. *Bell* and Mr. *Pemberton*, for the wife, insisted that there should be such a direction. It appeared in evidence, that the husband had on the marriage received 1,500*l.* stock belonging to the wife, and had made no Settlement upon her. Under such circumstances she might be held entitled either to the whole of this fund, or to a more considerable share than would otherwise be settled upon her. The Court is always influenced by such circumstances as to the amount of the fund to be settled. *Bond v. Simmons* (*h*).

Mr. *Heald* and Mr. *Wakefield*, for the Assignees, argued that there ought to be no such direction in the Decree, and cited *Mitford v. Mitford* (*i*), *Murray v. Elbank* (*k*), *Beresford v. Hobson* (*l*), *Burdon v. Dean* (*m*).

The VICE-CHANCELLOR:—

Upon a reference to the *Master* to approve of a proper Settlement upon the wife out of a particular property, it is always usual to direct the *Master* to have regard to

(*h*) 3 Atk. 20. (*k*) 10 Ves. 84. (*m*) 2 Ves. jun. 607.
(*i*) 9 Ves. 87. (*l*) 1 Madd. 367.2

1823.

GREEN

v.

OTTE.

any Settlement which the husband may have made upon the wife, *aliunde*. If the extent of the provision for the wife out of the particular property in question, is to be affected by any prior Settlement of other property made by the husband, it necessarily follows that regard must also be had to any other property possessed by the husband in right of the wife. For the prior Settlement may not be adequate, or more than adequate, to the equity of the wife in respect of the other property possessed in her right. The Cases of *Bond v. Simmons*, and *Elibank v. Montolieu* (n), are authorities, that regard must be had to the extent of the wife's fortune. Let it be referred to the *Master* to approve of a proper Settlement, regard being had to the extent of the wife's fortune, and to any Settlement which may already have been made upon her.

(n) 5 Ves. 744. The Decree in that Case directed a reference to the *Master* to approve of a proper Settlement upon the wife and children, "regard being had to the extent of her fortune and the Settlement already made upon her."

FIELDEN v. FIELDEN.

1822.
6th and 12th
December.

THIS Suit was instituted by the Executors of *Joshua Fielden*, deceased, to have his personal Estate applied in a due course of Administration. After the Bill was filed two Actions were brought against the Executors, one by a Bond Creditor, and the other by a Simple-contract Creditor, of the deceased, to recover their respective Debts. After the Decree had been made, the Executors pleaded to the former Action, *plene administravit* and *non est factum*, and, to the latter, *non assumpsit*,

Injunction.
Executor.

Mr. Wilbraham, for the Plaintiffs, moved for an *Injunction* to restrain the Creditors from proceeding in their Actions, on the ground that a Decree had been obtained in this Court for the administration of the Testator's Estate.

After a Decree for the Administration of Assets, the Executor pleaded a false Plea to an Action brought against him by a Creditor of the Testator, in order that he might have an opportunity to apply for an *Injunction* to restrain the Action; the Court granted the *Injunction*, and held, that the Creditor was not entitled to a Judgment against the Executor *de bonis propriis*.

Mr. Spence, for the Creditors :—

The Executors, instead of giving notice of this Decree, have pleaded, to the Actions, Pleas which the Creditors undertake to falsify; and they will then be entitled to Judgment against them, *de bonis testatoris*, *et si non, de bonis propriis*, and, therefore, the Court will not restrain them from proceeding in their Actions. *Ternewest v. Featherby (a)*, *Brook v. Skinner*, mentioned in the note to that Case.

Mr. Wilbraham, in reply, said, that the Law was mistaken in the Argument in *Ternewest v. Featherby*, and referred to *Harrison v. Beccles*, a Case before Lord Mansfield, as cited and approved by Lord Kenyon, in

1823.

FIELDEN
v.

FIELDEN.

Erving v. Peters (b); and also to Serjeant *Williams's* note to *Hancock v. Proud* (c), and he added that these authorities showed, that an Executor who pleaded *plenè administravit*, was liable only to the extent of Assets of the Testator come to his hands.

The *Vice-Chancellor* ordered this Motion to stand over, with liberty to the Executors to make such Affidavit as they should be advised.

12th December. An Affidavit was made by the Executors' Solicitor, stating, that, when he instructed his Pleader to draw Pleas to the Actions at Law, he informed him that the object in pleading to them was, to give effect to the Decree, by preventing the Plaintiffs at Law from obtaining Judgments before an Injunction could be obtained in aid of the purposes of the Decree; that the Pleas of *plenè administravit* and *non est factum*, were pleaded for the purpose of giving effect to the Decree, and without any particular instructions to plead the same, and through inadvertence, and with a view only of giving effect to the Decree; and that he never received any instructions from the Executors to plead those Pleas.

THE VICE-CHANCELLOR:—

I consider the Law now to be settled according to the doctrine laid down by Lord *Mansfield*, in the Case of *Harrison v. Beccles*.

In this Case it appears, from the Affidavit, that the Executors gave instructions to their Solicitor to plead to the Action, merely for the purpose of giving them time to apply to this Court; and that the plea of *plenè administravit* was a mere form adopted by the Solicitor

(b) 3 T. R. 688.

(c) 1 Saund. 336.

without communication with his Client. And, for that reason alone, I should have protected the Executor according to the decision of Lord Eldon, in the case of a judgment by default submitted to, merely with the view to apply to a Court of Equity (*d*).

(*d*) The case here alluded to is *Dyer v. Kearsley*, 2 Mer. 482.

1823.
FIELDEN
v.
FIELDEN.

HAWKINS v. SHEWEN.

1823.
7th March.

THIS Suit was instituted for the purpose of having the Trusts of *Jane Shewen's* Will carried into execution under the Decree of the Court.

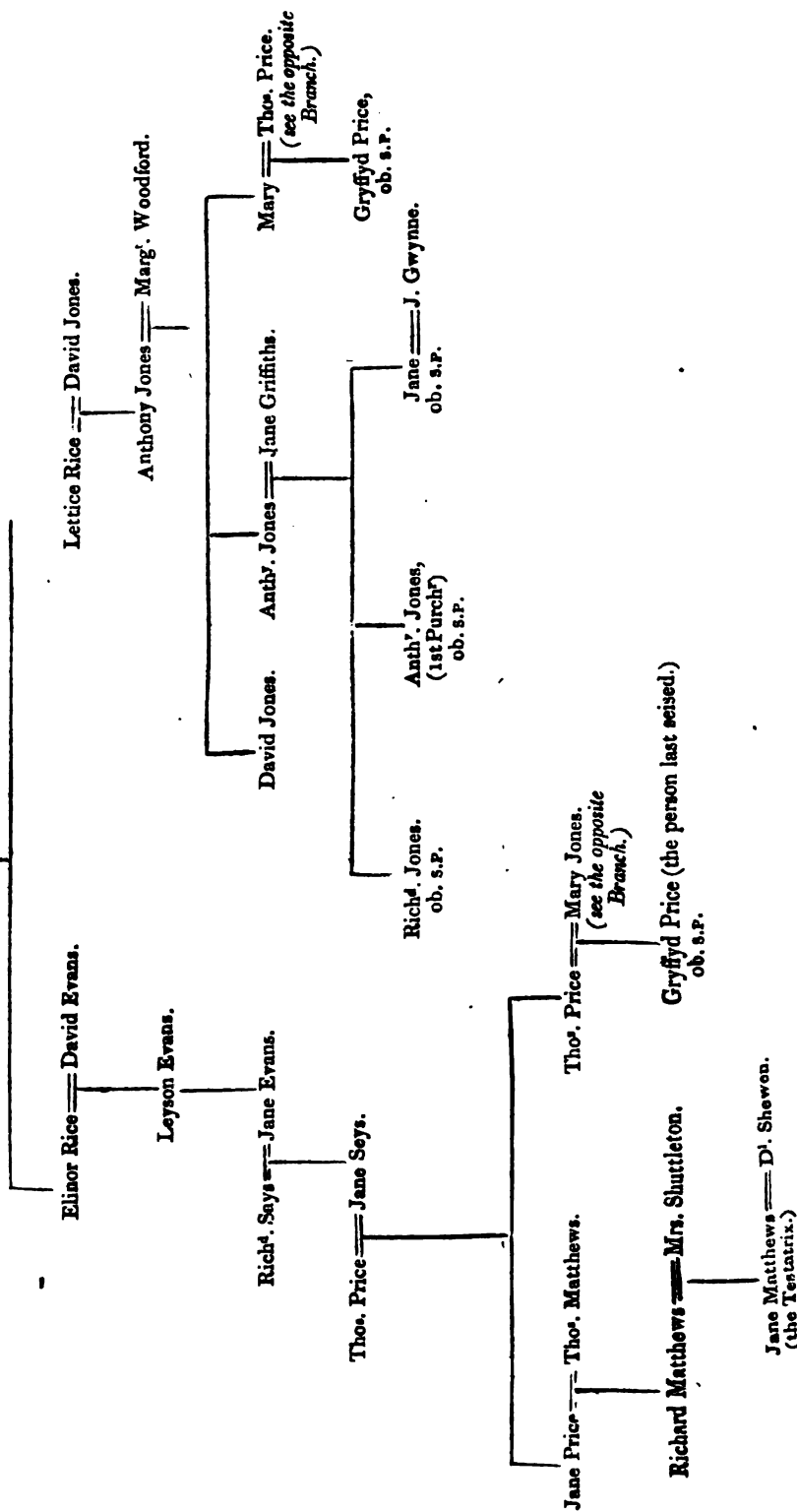
Descent.

By the Decree made at the hearing of the Cause, the real estates of the Testatrix were ordered to be sold in lots. At the sale, one of the lots was purchased by *Richard Kirkham*. An Order was obtained, directing a reference to the *Master* to inquire whether a good Title could be made to this lot. The *Master* reported, that a good Title could not be made to it, inasmuch as Mrs. *Shewen* claimed by descent from *Anthony Jones*, the first purchaser, through Sir *Walter Rice* her ancestor, and *Lettice Rice* his daughter, who married *David Jones*, without showing that the blood of *David Jones*, who was the father of *Anthony Jones*, who married *Margaret Woodford*, was extinct.

Where a person seised of an Estate by Descent *ex parte maternâ*, dies without Issue, the Descendants of his maternal Grandfather must all be extinct before any Descendant of a remoter maternal Ancestor can inherit, however nearly related to the *propositus*, *ex parte paternâ*.

Mrs. *Shewen's* pedigree was as follows :—

SIR WALTER RICE.



The Plaintiffs excepted to the *Master's* Report.

1823.

Mr. *Bell*, Mr. *Sugden*, and Mr. *John Wilson*, in support of the exception :

HAWKINS
v.
SHEWEN.

This Estate has always past by descent since the time of *Anthony Jones*, the first Purchaser. Mrs. *Shewen* certainly had a good Title by descent, for she was Heir at Law to *G. Price*, *ex parte paternâ*, and had also in her the blood of his mother *Mary Jones*. The *Master* objects to the Title, because *David Jones* might have had other descendants besides *Anthony Jones*, who married *Margaret Woodford*. Lord *Hale*, in his *Hist. Com. Law*, 2 vol. 120, says :—" The last actual seisin in any Ancestor makes him, as it were, the root of the descent, equally, to many intents, as if he had been a Purchaser ; and, therefore, he that can not, according to the rules of descents, derive his succession from him that was last actually seised, though he might have derived it from some precedent Ancestor, shall not inherit." And again he says, page 127 :—" If the son purchases lands and dies without issue, and it descends to any Heir of the part of the father ; then, if the line of the father, after entry and possession, fail, it shall never return to the line of the mother ; though, in the first instance, or first descent from the son, it might have descended to the Heir of the part of the mother ; for, by this descent and seisin, it is lodged in the father's line, to whom the Heirs of the part of the mother can never derive a Title as Heir, but it shall rather escheat." We admit that *Gryffyd Price* took by descent from his mother, *Mary Price* ; but she was related to *Anthony Jones*, the first Purchaser. Now, in collateral descents, it is not necessary that the claimant should prove himself to be Heir to the first purchaser ; it is sufficient if he can show himself to be of the blood of the first Purchaser, and the

1823.

HAWKINS
v.
SHEWEN.

nearest collateral relation of the person last seised. "It is not necessary that he that inherits be always Heir to the Purchaser. It is sufficient if he be of his blood, and Heir to him that was last seised." 2 *Hale's* C. L. 122. Mrs. *Shewen* was the nearest collateral relation of the whole blood of *Gryffyd Price*, and she was also of the blood of the first Purchaser. No relation of *David Jones* can be so near a collateral relation of *Gryffyd Price* as she was; and, therefore, it is no objection to her Title if there are other descendants of *David Jones* living; for they can never be the nearest collateral relations of the whole blood of *Gryffyd Price*. The effect of the descent and seisin in the paternal line, is to exclude a whole line of descendants, who would have been Heirs if they had not been intercepted by that descent and possession; and, in this Case, to cut out the line of *Mary Price* entirely.

Mr. *Treslove*, for the Report, contended, that in order to show that Mrs. *Shewen* was Heir at Law to *Gryffyd Price*, it was necessary to prove that the issue of *David Jones*, who married *Lettice Rice*, was extinct; and added, that it had been proved that *D. Jones* had had another son, besides the *Anthony Jones* who married *Margaret Woodford*, and that that son had issue.

The VICE-CHANCELLOR :—

The proposition stated at the Bar, that the Testatrix had a good Title, because she was the nearest collateral relation of the whole blood of *G. Price*, who was last seised, and was of the blood of the first Purchaser, is merely fallacious. In order to constitute a good Title, the Party must be the nearest collateral Heir of the whole blood of the person last seised on the part of the ancestor through whom the estate descended. When

Lord *Hale* speaks of the nearest collateral relation of the whole blood of the person last seised and of the blood of the first Purchaser, he means the latter branch of the expression as a qualification, and not an addition to the first branch, that the collateral Heir of the whole blood must claim through the ancestor from whom the estate descended, and thus be of the blood of the first Purchaser. If this estate had descended to *G. Price*, *ex parte paternâ*, then the Testatrix would have been his nearest collateral Heir of the whole blood; for the question would then have been, who was Heir to his father? But as this estate descended from the mother, the question is, who is the nearest collateral Heir of the whole blood, *ex parte maternâ*? and the blood of *David Jones*, the grandfather of the mother, must necessarily inherit to her before the blood of *Lettice Jones*, the grandmother of the mother, through whom the claim must be made for the Testatrix.

1823.

HAWKINS
v.
SHEWEN.

Overrule the Exception.

1823.
8th March.

WILLIAMS v. DAVIS.

Practice.
Injunction.

An Order to dissolve an Injunction *nisi*, obtained after Exceptions filed to the Answer, is irregular.

IN this Case, the Common Injunction had been obtained, for want of an Answer. On the 21st of February, the Answer was filed. The Plaintiff took Exceptions to it; and on the 26th of February, delivered them to the Defendant's clerk in Court. On the next day, which was a Seal-day, the Defendant obtained the Common Order to dissolve the Injunction, *nisi*.

Mr. *Treslove*, for the Plaintiff, now moved to discharge that Order, for irregularity, on the ground that it had been obtained after Exceptions to the Answer had been taken and delivered to the Defendant's clerk in Court; and he said, that the Order to dissolve an Injunction *nisi*, alleges, that the Defendant has put in a full and perfect Answer to the Bill.

The *Vice-Chancellor*, under these circumstances, held that the Order was irregularly obtained, and granted the Motion.

Followed in Hawes v Hawes
1 Beav. 197.

HARRIS v. DE TASTET.

1823.
27th February
and 18th March.

Practice.

AN Order, made in this Cause, for certain inquiries to be made by the *Master*, contained the usual direction that the Parties should produce, before the *Master*, upon oath, all books, papers and writings, in their custody or power, relating to the subjects of the inquiries. The Defendant having refused to comply with that direction, the *Master*, on the 20th of December 1822, granted his Certificate of the Defendant's refusal. On the same day, the Plaintiff obtained the Common Order for the Defendant to produce the books, papers and writings before the *Master*, within four days after personal notice of the Order to his clerk in Court. The Certificate was not filed until the 9th of January 1823, nor was the Order delivered out by the Registrar, until the 11th of February following. On the next day, the Plaintiff served the Order on the Defendant's clerk in Court.

The *Master's* Certificate of disobedience to a Decree, directing Deeds, Papers and Writings to be produced before him, need not be filed within four days after it is signed; it is sufficient if it be filed before the Four-day Order is delivered out.

Mr. *Bell*, for the Defendant, moved to discharge the Order, on the ground, that by an order of the 29th of October 1692, (*Beames's Orders*, 292,) the Certificate ought to have been filed within four days after it had been signed by the *Master*, and that the Four-day Order ought not to have been obtained before the Certificate was filed.

Mr. *Pemberton*, for the Plaintiff, said that the present practice was to date the Certificate and Four-day Order on the same day, so as to leave no interval between them for the Party to obey the Decree, and to file the Certificate afterwards; but not to proceed upon the Four-day Order until after the filing of the Certificate;

1823.

HARRIS
v.

DE TASTET.

and that the Register never, in fact, delivered out the Order until the Certificate had been filed, and he cited Sir *John Eyles v. Ward (a)*.

The *Register*, Mr. *Walker*, on being referred to by the *Vice-Chancellor*, confirmed Mr. *Pemberton's* statement of the practice, and *His Honor* refused the Motion with Costs.

1823.

17th and 31st
January,
and 31st May.*Prochein ami.*

PENNINGTON v. ALVIN.

THE Bill was filed by a *feme covert* and her infant child, by *Joseph Lowe*, as their next friend, against her husband, and her brother, the Defendant *Alvin*.

Where the next friend of a *feme covert* had taken the benefit of the Insolvent Debtors Act, but was detained in Prison, and had obtained an Order upon the husband for payment of his groats after the Answer was filed, and before any other proceeding was taken in the Cause, a Motion by one of the Defendants, that the next friend might be removed and another appointed, was refused, as being improper in form; but leave was given to apply to stay proceedings until the next friend should be changed, or security given for Costs.

The husband had brought an Action against *Lowe* for criminal conversation with his wife, and having obtained a verdict had taken him in execution. When in execution he took the benefit of the Insolvent Debtors' Act, but was detained in prison for a year, and, therefore, had applied for his groats from the husband, and obtained an order for payment of them. The verdict was obtained before the Bill was filed; but the taking of the benefit of the Insolvent Debtors' Act, and the order for payment of the groats, were subsequent to the filing of the Defendant's Answer, and no step had been taken in the Cause since. The object of the Suit was to obtain maintenance and support out of a fund to which the wife claimed to be entitled for her separate use, and in which the infant also was interested.

Duncan v. Manna 3 B. & W. 154. (a) 2 P. W. 517.

Mr. *Roupell*, on behalf of the Defendant *Alvin*, now moved that *Lowe* might be removed from being the next friend of the wife, and that a new next friend might be substituted in his place. He said that, as the *prochein ami* was liable to pay the costs of the Suit, it was necessary that he should be a person of substance; and that as *Lowe* was insolvent it was a sufficient ground for removing him from that office. *Wale v. Salter (a)*.

1823.
PENNINGTON
v.
ALVIN.

Mr. *Koe*, *contra* :—

In this Case the same person is *prochein ami* for the infant as well as for the wife. This application comes too late. It is very hard, after the Suit has proceeded the length it has done, to impose upon the Parties the necessity of naming a new next friend. *Anon. (b)*; *Squirrel v. Squirrel (c)*; *Anon. (d)*; *Doe v. Alston (e)*; *Sayers on Costs*, 84.

The *Vice-Chancellor* suggested that the proper Motion would have been, that all proceedings in the Suit might be stayed until security were given for Costs; and he directed that the Motion should stand over, in order that he might consider what Order ought to be made upon it.

THE VICE-CHANCELLOR :—

I should hesitate much before I called upon the next friend of an infant to give security for Costs; for any person may file a Bill in the name of an infant. But the Suit of a *feme coverte* is substantially her own Suit, and her next friend is selected by her. This is a gross

31st May.

(a) *Mosley*, 86.

(b) 1 *Ves. jun.* 409.

(c) 2 *P. W.* 297 n; and *S. C.* 2 *Dick.* 765. This Case seems to be the same as the former one.

(d) *Mos.* 86.

(e) 1 *T. R.* 491.

1823.

PENNINGTON

v.

ALVIN.

Case, and I cannot permit this Suit to proceed, on the part of the *feme covert*, without security being given for Costs. I must, however, refuse this Motion, because it is incorrect in form; but the Defendant may apply to stay all proceedings in the Cause until the next term is changed, or security is given for Costs.

1823.

27th February.

8th March.

WRIGHT v. MUDIE.

Set off of Costs.

The Court will not direct the Costs of a Suit and of an Action between the same Parties to be set off against each other.

THE Defendant had brought an Action in the Court of King's Bench against the Plaintiff, and was nonsuited. The Bill in this Cause was filed for a discovery, in aid of the defence to that Action. The Defendant had put in his Answer, and moved for his Costs.

Mr. *Barber*, for the Plaintiff, now moved that the Defendant might be restrained, by Injunction, from suing out a Subpœna for his Costs in this Suit, on the ground that the Defendant having been nonsuited in the Action, the Plaintiff was entitled to set off his Costs in that Action, against the Defendant's Costs in this Suit. Where the same Party has to receive, as well as to pay Costs, Courts of Law will prevent the adverse Party from proceeding for any thing but the Balance. Upon this subject, Courts of Law act upon equitable principles; and it would be hard, if a Party was not to have the benefit of those principles in this Court. *Hullock on Costs*, 467; *Hall v. Ody* (a); *Shergold v. Brewster* (b); *Gurish v. Donovan* (c); *Shine v. Gough* (d); *Taylor v. Popham* (e); *Ex parte Rhodes* (e).

(a) 2 Bos. & Pull. 28.

(b) Bunb. 29.

(c) 2 Atk. 166.

(d) 2 Ball & Beatty, 33.

(e) 15 Ves. 72, 539.

Mr. Spence, *contra*:—

1823.

WRIGHT
v.
MUDIE.

The practice of the Court of King's Bench upon the subject in question, has not been correctly stated by Mr. Barber. It is laid down by Lord *Kenyon*, in *Randle v. Fuller* (a), and that decision was followed in *Glaister v. Hewer* (b), and *Middleton v. Hill* (c). I have not been able to find any Case which sets up a different practice from that stated by Lord *Kenyon*; therefore, it appears to be the settled practice of the Court of King's Bench, that no set-off can be made to the prejudice of the solicitor's lien. The Case of *Taylor v. Popham* is not applicable; for it relates to Costs in this Court only. That Case shows strongly, that the practice of the Court of King's Bench remains the same as it was stated to be by Lord *Kenyon*; for the Lord Chancellor, in his judgment, states it to be so.

THE VICE-CHANCELLOR:—

It is clear upon the authorities, that the practice of the Common Pleas, as stated in the Case of *Hall v. Ody*, that the lien of the Attorney for his Costs is subject to the equitable claims of the Parties as between themselves, is not adopted in the Court of King's Bench; and Lord *Eldon*, then Chief Justice of the Common Pleas, expressly states it to be contrary to the practice of the Court of Chancery. In *Taylor v. Popham*, Lord *Eldon* states the Rule of this Court thus: That where in a Cause Costs may have been given in different proceedings on both sides, there the lien of the Solicitor is only on the balance of Costs which may be due to his Client. That Case is not an authority for setting off, against each other, the Costs of different Causes in this

(a) 2 T. R. 456. (b) 8 T. R. 69. (c) 1 M. & S. 240.

1823.

WRIGHT
v.
MUDIE.

Court; and still less, for setting off Costs here against Costs in the King's Bench, when it is clear that that Court would not permit the set-off of Costs there against the Costs here.

1818.

6th August.

THE BISHOP OF LONDON'S CASE (a).

Where, by Act of Parliament, a Corporation was empowered to purchase subsisting interests in certain Hereditaments, and it was directed that the Purchase-money should be re-invested in Land, and in the mean time be laid out in the Funds, and the Dividends paid to the Persons entitled to the Rents: Held, that neither Persons who had taken Leases, after the passing of the Act, nor the Lessors, in respect of their right to renew, were entitled to any compensation out of the Purchase-money.

BY the 55 Geo. III. c. 91, the Lord Mayor, Aldermen and Commons of the City of *London* were empowered to make a site for a new Post-office, by taking down and laying open the Buildings, Lands and Hereditaments described in the Schedule to the Act and to agree for the purchase of such Houses and other Hereditaments, and of any subsisting leases, estates and interests therein, as they should think proper; and Corporations aggregate and sole, and all other persons who were or should be seised or possessed of, or interested in, any Hereditaments described in the Schedule, which the Lord Mayor, Aldermen and Commons should think proper to purchase, were authorized to sell and convey the same; and all Bodies Corporate, and other Owners of Houses, Lands and Hereditaments, were empowered to accept such satisfaction for the value thereof, as should be agreed upon between them and the Lord Mayor, Aldermen and Commons; and, in case they could not agree as to the amount of such satisfaction, the same was to be ascertained by a Jury; and it was directed, that the money to be paid for any Hereditaments to be purchased under the Act, belonging to any Body Politic or Corporate, should be paid into the Bank of England, in the name of the Accountant General of this Court, to the intent that

(a) *Ex relatione.*

it might be laid out, under the direction of the Court, in the purchase of other Lands and Hereditaments, to be conveyed to the same uses as the Hereditaments so purchased were subject to; and that, until such purchase, the money should, by order of the Court, be invested by the Accountant General, in his name, in the purchase of Stock; and that, until the Stock should be ordered by the Court to be sold for the purpose of being so laid out, the Dividends should be paid to the Bodies or Persons who would, for the time being, have been entitled to the Rents and Profits of the Hereditaments directed to be purchased, in case such purchase had been made.

1818.

BISHOP OF
LONDON'S
CASE.

When this Act was passed, the Bishop of *London*, in right of his See, was seised of nine Houses in *Newgate-street* and *Cheapside*, which were then let, at certain small rents, on leases for lives or years, and were part of the Hereditaments described in the Schedule to the Act; and, subject to the leases, were of the value of 9,895 *l.* 0 *s.* 7 *d.* The Bishop, after the passing of the Act, granted a concurrent lease of one of these Houses, for a fine, to one *Burn*; and, of the others, to one *Blount*, as a Trustee for *Burn*. The Bishop claimed before the Jury, who had been summoned to assess the value of the property, a certain part of the 9,895 *l.* 0 *s.* 7 *d.* as being due to him personally in respect of his general right of renewal of the possessions of the see. And *Blount* and *Burn* claimed other sums as being due to them for the value of their concurrent leases. The Recorder of *London*, who presided at the trial, directed the Jury not to take into their consideration either the personal claim of the Bishop, or the value of the concurrent leases; because those leases had been granted after the passing of the Act. And the verdict of the

1818.

BISHOP OF
LONDON'S
CASE.

Jury in fact established, that the whole sum was the property of the See.

The 9,895*l.* *os.* 7*d.* having been afterwards paid into the Bank in the name of the Accountant General, pursuant to the Act, the Bishop of *London*, and *Blount*, presented a Petition to the Court, asserting the same claims as had failed before the Jury. This Petition now came on to be heard.

The VICE-CHANCELLOR :—

All the Costs of the proceedings, both here and in the Lord Mayor's Court, must be paid out of the 9,895*l.* *os.* 7*d.* the surplus must be invested in the purchase of 3*l.* per cent Bank Annuities; and I must direct a reference to the *Master*, to inquire what were the annual Rents of the Houses at the time of the sale. When this Money is invested in the purchase of Land, the Bishop will be entitled to grant one or more lease or leases for twenty-one years, or three lives, at his option, of the Hereditaments to be purchased, reserving an annual Rent or Rents equal in amount to the annual Rents of the Houses at the time of the sale, and to renew such Leases from time to time, at the same Rents, in like manner as is usual in cases of Leases by Bishops; and if the Bishop should cease to be Bishop of *London*, in consequence of his decease or otherwise, before he has granted such Lease or Leases, then he or his personal Representatives may apply to the Court, as they shall see fit. And until the Money is invested in Land, the Dividends of the Stock must be paid to the Bishop and his Successors.

GRIFFITH v. HEATON.

1823.
14th March and
1st May.

*Vendor and
Vendee.
Account. Rests.
Practice.*

THE Bill was filed by the vendors of an Estate against the purchaser, for a specific performance of the Agreement for the purchase. Several sums of money had at different times been paid by the Defendant on account of his purchase, and the *Master*, in taking the accounts of those sums, had made rests at the times when they were paid. The question was, whether the *Master* was justified in taking the accounts in that manner.

Where payments have been made by a Vendee at different times on account of his purchase, all exceeding the Interest due at the times of such payments, and the Decree in a Suit by the Vendor for a specific performance, directs an account to be taken of what is due to the Plaintiff for the Principal and Interest in respect of the purchase, rests are always made in taking the account.

The Agreement was dated the 1st of June 1807. The Purchase-money was 56,000*l.*; 2,800*l.*, part of it, was paid, as a deposit, on the signing of the Agreement; and the remainder was to be paid by two instalments, on the 1st of January and the 2d of August 1808, with Interest at five per cent; and on the latter of those days the Conveyance was to be executed. By the Decree made on the hearing of the Cause, it was referred to the *Master* to take an account of what was due to the Plaintiff for Principal and Interest, in respect of the Purchase-money. The *Master*, by his Report, found that various sums of money had been paid by the Defendant from time to time on account of the Purchase-money and the Interest thereof, amounting in the whole to the sum of 47,795*l.* 12*s.* 8*d.*; and he certified, that it appeared to him to be fair and reasonable that the account of Principal and Interest remaining due in respect of the purchase, should be taken with periodical rests at the

1823.

GRIFFITH
v.
HEATON.

respective times when such payments were made ; and that he had accordingly taken the account with such rests. To this Report the Defendant excepted, because the *Master* had stated the account of Principal and Interest remaining due to the Plaintiffs, with rests at the respective times when the several sums mentioned to have been paid by the Defendant, on account of the Purchase-money and Interest, were respectively paid ; whereas he ought not to have made any rests, he not having been directed by the Decree so to do ; and the several sums paid by the Defendant ought to have been allowed to him as payments out of his Purchase-money.

Mr. *Horne* and Mr. *Roupell*, in support of the Exception, said, that the *Master* had taken the accounts in this Case, upon the principle adopted in taking accounts between Mortgagor and Mortgagee ; but that that mode was never followed in Suits between Vendor and Vendee.

Mr. *Bell* and Mr. *Parker*, for the Report, said, that when payments were made to a Creditor, he had a right to apply them, either to the account of Principal or of Interest, at his pleasure ; and that the *Masters*, in taking accounts, acted upon that principle.

The *Vice-Chancellor* said, that he must learn the practice of the *Masters* upon the subject ; and, accordingly, directed the following Question to be submitted to them :—

“ By a Decree made upon a Bill for a specific performance, it was ordered, that it be referred to the *Master* to take an account of what was due to the Plaintiffs, from the Defendant, for Principal and Interest, in respect

1823.

GRIFFITH
v.
HEATON.

of the Purchase-money for the estate and premises comprized in the Agreement in the Pleadings mentioned; such Interest to be computed at five per cent per annum. The account extends to a period of ten years; and, in the course of that time, the Defendant had made sixteen payments on account, all exceeding the Interest due at the time of such payments. Is it the practice of the *Masters'* offices, under such circumstances, to take the accounts directed by the Decree with rests, at the sixteen periods when the sixteen payments were made, making at each rest, a new principal sum to carry Interest, formed from the Balance then due, on account of Principal and Interest?"

In reply to this question, a Certificate was returned to the *Vice-Chancellor*, signed by nine of the *Masters*, by which they stated, that they had considered the question proposed to them, and that, under the circumstances above mentioned, it was the practice of the *Masters'* offices to take accounts in the manner referred to by his *Honor*.

The *Vice-Chancellor* said, that he concurred in this Certificate, and must, therefore, overrule the Exception.

1823.
28th February,
and 17th April.

Practice.
Sequestration.

The Court will order a Sequestration to issue against a Defendant, who is in contempt, for not putting in an examination to interrogatories before the Master.

LUPTON v. HESCOTT.

THE Defendant having refused to put in his examination to interrogatories which had been exhibited before the *Master* under the Decree, had been taken into custody by the Sergeant at Arms, and committed to the Fleet.

Mr. *Wray* now moved, that a Sequestration *nisi* might issue against him, until he should put in his examination.

The Decree, in this Case, is not for payment of money, but to put in an examination to interrogatories, and the question is, Whether a Sequestration can be awarded in such a Case? In *Maynard v. Pomfret* (a), Lord *Hardwicke*, after a Decree, refused to discharge a Sequestration which had issued against the Defendant for want of an Answer, and kept it on foot as a security for the Defendant performing the Decree. *Shaw v. Wright* (b).

The *Vice-Chancellor* said, that he would not decide upon the Motion, until he had consulted the *Register* (c).

(a) 3 Atk. 468.

(b) 3 Ves. 22.

(c) The *Vice-Chancellor* was furnished by Mr. *Walker*, the Register, with the two following Cases:—

Practice.
Sequestration.

Sequestration ordered against a Party in custody, for contempt in not producing Papers.

TRIGG v. TRIGG.

April 1759.—The usual Decree was made in this Cause for a partition, and for the production of Deeds, &c. before the Commissioners. An attachment had issued against the Defendant for not producing the Deeds in his possession, and he being brought to the bar of the Court was turned over to the Fleet. The Plaintiff moved, specially, that a Sequestration might issue against the Defendant. The Defendant appeared by

The VICE-CHANCELLOR :—

I am of opinion, that the Plaintiff is entitled to a Sequestration in this case; whether the produce of it is applicable to the purposes of the Cause, it is not necessary now to inquire. I shall order the Sequestration to continue until the Defendant clears his contempt, and until the further order of the Court.

1823.

LUPTON
v.
HESCOTT.

17th April.

Counsel and opposed the Motion; but the Court ordered the Sequestration in the first instance. Reg. Lib. B. 1758, E. T. This Case is reported, 1 Dick. 325.

DETILLIN v. GALE.

By an Order dated 10th May 1799, it was referred to the *Master* to tax the Defendant *Sydney's* Bill of Costs, and *Sydney* was ordered to produce before the *Master*, on Oath, all Deeds, &c. in his custody belonging to the Plaintiff or his Estate. *Sydney* was served with this Order in the Fleet Prison. The *Master* having certified that *Sydney* had not produced the Books to him, it was ordered that *Sydney* should produce them before the 1st day of next Term, or be confined a close Prisoner in the Fleet Prison. *Sydney* having been served with the Order, and the *Master* having certified that he had not produced the books, &c. a Sequestration *nisi* was ordered against him on the 24th May, and on the 17th July 1799 it was made absolute. Reg. Lib. 1798, T. T.

Hensage v. Andover 34d. Jan. 369.

1823.
13th March.

WARTER v. HUTCHINSON.

Will.
Construction.

Where real estates were devised in strict settlement, subject to a Trust for raising portions for younger children during the minority of the Tenant for Life, out of the rents and profits, or by sale or mortgage: held, that certain funds which had arisen from the rents during the minority of the tenant for life, were applicable to the payment of the portions, and that the deficiency only could be raised by sale or mortgage.

THOMAS MEREDITH, deceased, by his Will, duly executed to pass freehold estates, directed all his debts and funeral expenses to be paid by his Trustees and Executors, and for that purpose he charged all his messuages, lands, tenements, and hereditaments, in the counties of *Denbigh* and *Chester*, with the payment of the same, in aid of his personal estate; and, subject thereto, he devised all his messuages, lands, tenements, and hereditaments, unto *Brownlow York*, *Richard Lloyd*, and *John Hutchinson*, their Heirs and Assigns, in trust to permit his sister *Margaretta Warter*, the wife of *Joseph Warter*, and her Assigns, during her life, to take thereout an Annuity of 200*l.*; and his aunt *Mary Newton*, and her Assigns, during her life, an Annuity of 100*l.* And, subject to those Annuities, he gave the same messuages, lands, tenements, and hereditaments, to the same Trustees, their Heirs and Assigns, until his nephew *J. R. M. Warter*, the son of his sister *Margaretta Warter*, should attain the age of twenty-one years; and if he should die in the mean time, then until *Henry Warter*, the second son of his sister *Margaretta Warter*, should arrive at that age; and if *Henry Warter* should die in the mean time, until the daughter of *Margaretta Warter* should arrive at that age; upon trust, in the first place, as soon as conveniently might be after his decease, to raise out of the rents and profits of the premises, or by sale or mortgage thereof, or of a competent part thereof, any sum or sums of money that would be sufficient to pay his debts and funeral expenses, and the costs and expenses his Trustees should be put unto

1823.

WARTER
v
HUTCHINSON.

on account of the trusts of his Will, and the sum of 100 *l.* a-piece, which he thereby gave to them, with a direction to them to retain the same out of the rents and profits of the premises, for their trouble: And upon further trust, to raise out of the rents and profits of the premises, or by sale or mortgage thereof, or of a competent part thereof, the sum of 2,000 *l.* together with all costs and charges attending the raising the same, and to pay the same to *Henry Warter* as soon as he attained the age of twenty-one years; and if *Margaretta Warter* should have more than one younger child, then he directed his Trustees to raise, out of the rents and profits of the premises, the sum of 3,000 *l.* and pay the same to and among such younger children, share and share alike, as soon as they should attain their respective ages of twenty-one years; and he charged all the said hereditaments with the payment of the same: And upon further trust, to apply a proper sum of the money, arising from the rents and profits of the said premises, for the maintenance and education of *J. R. M. Warter* till he should arrive at the age of twenty-one years; and when he should arrive at that age, then, upon further trust, to pay him the rest of the rents and profits of the premises, if any should remain in their hands after payment of all his debts and funeral expenses, and the sum of 2,000 *l.* and 3,000 *l.*, as the case should happen; and if *J. R. M. Warter* should die before he attained the age of twenty-one years, then he directed his Trustees to apply a sufficient sum of money, arising from the rents and profits of the premises, for the maintenance and education of *Henry Warter* till he should attain the age of twenty-one years; and when *Henry Warter* should attain that age, then upon trust to pay him the rest of the rents and profits, if any should remain in their hands after

1823.

WARTER
v.
HUTCHINSON.

payment of his debts and the money intended for his sister's younger children as aforesaid; and, in the mean time, to place out the money arising from the rents and profits of the premises at interest for their benefit; and when *J. R. M. Warter* should attain the age of twenty-one years, or, in case of his death, when *Henry Warter* should arrive at that age, or, in case of his death, when his niece *Margaretta Mary Elizabeth Warter* should arrive at that age, he gave his messuages, lands, tenements, and hereditaments, situate in the counties of *Derby* and *Chester*, or elsewhere in *Great Britain*, subject as aforesaid, to the Trustees, their Heirs and Assigns, to the use of *J. R. M. Warter* and his Assigns, for his life, without impeachment of waste, with remainder to Trustees to preserve contingent remainders, with remainder to the use of the first and other sons of the body of the said *J. R. M. Warter*, successively in tail male, with remainder to his first and other daughters, successively in tail male, with remainders to *Henry Warter* for life, and to his sons and daughters in tail male, in like manner; with remainders to *Margaretta Mary Elizabeth Warter* for life, and to her sons and daughters in tail male, in like manner; with remainder to the Testator's sister *Margaretta Warter*, her Heirs and Assigns, for ever. And as to all his household furniture, and all his silver plate whatsoever, that should happen to be at his mansion-house, at *Pentrelychan Hall*, at the time of his death, he directed that the same, or any part thereof, should not be sold or removed from thence, but should go and continue as heir-looms, for the use of the heirs of *Pentrelychan Hall* for ever.

The Testator died in 1802. Shortly after his decease

this Suit was instituted, for the purpose of carrying into execution the Trusts of his Will.

1823.

WARTER
v.
HUTCHINSON.

After the Cause had been heard for further directions, *J. R. M. Warter* died, an infant and intestate, leaving *June Warter*, his widow, and *Margaretta Elizabeth Meredith Warter*, his only child, his Heir at Law.

Jane Warter, the widow of *J. R. M. Warter*, took out Letters of Administration to her deceased husband, and a Bill of Revivor and Supplement was afterwards filed against her and her daughter *M. E. M. Warter*.

The *Master* by his Report (which was made in *J. R. M. Warter's* lifetime) had found that *Margaretta Warter*, the Testator's sister, had four younger children: *Henry*, *Margaretta Mary Elizabeth*, *Joseph*, and *Thomas*. *Henry* attained the age of twenty-one years on the 16th of November 1821, and *Margaretta Mary Elizabeth* on the 7th of August 1822.

By an Order made upon the Petition of *Margaretta Mary Elizabeth Warter*, on the 5th of November 1822, it was referred to the *Master* to compute Interest on the sum of 3,000*l.* directed to be raised for the younger children of *Margaretta Warter*, from the 16th of November 1821; and that sum was ordered to be raised out of two sums of cash and stock, which had arisen from the rents of the devised estates, and one-fourth part of it paid to the petitioner, without prejudice to any claim she might have upon the remaining three-fourth parts.

In December 1822, *Margaretta Elizabeth Meredith Warter* died; and her mother afterwards took out

1823.

WARTER
v.
HUTCHINSON.

Letters of Administration to her, and, as the personal representative of her husband and daughter, claimed the whole of the funds which had arisen from the savings of the rents and profits.

In pursuance of this claim, Mr. *Hart* and Mr. *Temple* now moved to rescind the Order of the 5th of November 1822.

It is the rule of the Court, in all Cases where a Testator directs portions to be raised out of real estates, to look through the Will, to see whether the Testator meant the body of the estate to be charged, or the rents and profits only. The first Case upon this point is a very strong one; it is Sir *William Middleton's Case* (a).

The Testator having directed the 3,000*l.* to be paid at a fixed day, namely, when *Henry Warter* should attain twenty-one, he must have meant that it should be raised out of the body of the estates, and not out of the rents and profits; for, otherwise, the portions might have become payable before the rents were sufficient to pay them. There is also another very strong Case upon this subject, *Warburton v. Warburton* (b).

I apprehend that every principle on which that Case was decided applies here; for if it is held that the rents and profits are applicable, the person who has the contingent interest in the property has the usufruct taken from him whilst the portions are being raised. Then, as to the direction that the Trustees should pay the rest and residue of the rents and profits to *J. R. M. Warter*, these words do not mean annual rents, but the surplus

(a) 2 Chan. Ca. 1.

(b) 2 Vern. 420.

of the monies remaining in the hands of the Trustees after paying the portions; for, in almost every case, the Court has construed the words "rents and profits" to mean the produce of the *corpus* of the estate.

1823.

WALTER
v.
HUTCHINSON,

Mr. *Sugden* and Mr. *Parker*, *contrà*.

The VICE-CHANCELLOR :—

This, like every other Case upon a Will, is a question of intention to be collected from the whole Will. This Testator has expressly stated that his first devisee, who attains twenty-one, is to take such accumulated rents and profits only as shall remain after satisfying the portions, and, of consequence, must have intended that the accumulated rents and profits should be first applied in payment of the portions. To the extent in which the accumulated rents and profits would not have satisfied the portions, the Trustees would have been entitled to proceed by sale or mortgage.

Motion refused (c).

(c) In the course of this Cause a Case was made for the opinion of the Court of Common Pleas. For the report of that Case, see 5 Moore, 143. And another Case was afterwards made for the opinion of the Court of King's Bench, and is reported 1 Barn. & Cress. 721.

1823.
18th March.
and 31st May.

MOIR v. MUDIE.

Solicitor.

A Solicitor, who had refused to act any longer for a Party in the Cause, was ordered to permit the Party to inspect Papers in his possession, at all reasonable times, without any undertaking, on her part to proceed to a taxation of his Bill.

THE Solicitor of one of the Defendants having refused to act any longer for her, Mr. *Roupell* moved, on her behalf, that the Solicitor might be ordered to deliver up to her all papers in his possession relating to the Cause. He cited *Cresswell v. Byron (a)*, and *Commerell v. Poynton (b)*, and said that in this Case, as in *Cresswell v. Byron*, the Party making the application swore that there was no fund for payment of the Costs, except the fund in the Cause.

The *Vice-Chancellor* doubted whether he could make the Order, without imposing on the Defendant the condition of proceeding to an immediate taxation of the Solicitor's Bill, with the usual undertaking to pay the amount of it when taxed; and he therefore directed the Motion to stand over for the purpose of considering the subject.

31st May.

The *Vice-Chancellor* ordered that the Solicitor should permit the Defendant to inspect her papers, in his possession, at all reasonable times; and said, that as the Solicitor had thought fit to retire from the Suit, he had no right to retard its progress; and that, therefore, the permission given to the Client for inspection of the papers was not an indulgence but a right, and gave no claim to the Solicitor for any special assistance from the Court; but that he must be left to his ordinary remedy against his Client.

(a) 14 Ves. 271.

(b) 1 Swanst. 1.

HARRIS v. BODENHAM and Others.

1823.
18th March.

Practice.
Clerk in Court.

CERTAIN letters and other documents had been deposited by the Defendants, *Garrett, Shaw, and Hornyhold*, with their respective Clerks in Court, under the usual Order, which had been obtained by the Plaintiffs for that purpose.

Mr. *Pemberton*, for the Plaintiff, had moved on a former day that these letters and documents might be delivered over to the Plaintiff's Clerk in Court, and be by him produced, at the joint expense of the Plaintiff and the Defendant *Garrett*, and given in evidence for either Party at the ensuing Assizes for the county of *Hereford*, in the Action there depending between them.

The Court never orders a Clerk in Court, with whom Exhibits have been deposited under the usual Order, to deliver them up to any other person, for the purpose of their being produced in Court, or at the Assizes, without the consent of all parties, and payment of the Clerk in Court's fees.

Mr. *Roupell*, for the Defendant *Hornyhold* and his Clerk in Court, opposed the Motion, and said that the Clerks in Court were responsible for the safe custody of all the documents deposited with them, and were entitled to all fees accruing from the inspecting or copying of them, and also to attend with them in Court or elsewhere, as might be required; and that no instance had ever occurred, where the Court had taken the documents belonging to one Party, and placed them in the hands of his Adversary, or of his Adversary's Clerk in Court.

The *Vice-Chancellor* ordered the Motion to stand over, that he might inquire into the practice. And on this day he said, that he had received a Certificate from the Clerks in Court, which was as follows:—

1823.

HARRIS
v.BODENHAM,
and others.

"We do certify, that in all Cases where Exhibits are left under an Order in the hands of the Clerk in Court for a Plaintiff or Defendant, and it has become necessary to have those Exhibits produced in Court, or at the Assizes, it is and ever has been the invariable practice, that the Clerk in Court in whose custody they are so deposited, or some person authorized by and acting for him, and no other person, should attend therewith, upon payment of his fees and expenses. And we know of no instance where Exhibits have been ordered to be delivered up for the aforesaid purpose to any other person, unless by the consent of all Parties, and upon payment of the Clerk in Court's fees."

His *Honor* observed, that this Certificate was a very strong one, and that he must hold the practice to be as stated in it.

Motion refused.

1823.

22d March, and
31st May.

CANN v. CANN.

Vendor and Pur-
chaser. Title.

JOHN CANN, esquire, deceased, by his Will, duly executed to pass freehold estates, gave legacies to his children, and devised and bequeathed the residue of his real and personal estates, after payment of his debts, legacies, and funeral expenses, to his wife *Rebecca Cann*, absolutely, and appointed her Executrix of his Will.

Where a devisee of real estate subject to debts and legacies, had contracted to sell the estate, in order to raise money to pay the debts, and afterwards a Bill was filed against her by the Legatees for the administration of the Testator's estates, and the Purchaser consented to go before the Master, upon a reference as to the Title in that Suit; held, that he was not thereby bound to take an equitable Title, but might insist on having the same Title, as he might have required if a Suit had been instituted against him for a specific performance of his contract; and that as two Commissions of Bankrupt had issued against the devisee before the contract was entered into, though neither of them was proceeded in, he was not bound to accept the Title.

Mr. *Cann*, at the time of his death, carried on the business of a Banker, in partnership with Messrs. *Williams* and *Searle*; and Mrs. *Cann*, after her husband's death, continued the business in partnership with the same gentlemen. On the 23d of December 1820, a joint Commission of Bankrupt was issued against her and her Partners, and on the 14th of January 1822 a separate Commission was issued against her, but neither of the Commissions was opened. In July 1821 Mrs. *Cann*, in order to raise money to pay her late husband's debts, agreed to sell part of the real estates to one *Arscott*. In the December following, a Bill was filed against her by her children, for the administration of the Testator's real and personal estates.

1823.

CANN
v.
CANN.

By the Decree made on the hearing of the Cause, on the 28th of January 1822, it was (amongst other things) referred to the *Master*, to inquire whether Mrs. *Cann* had entered into any Contracts for the sale of any parts of the Testator's real estates, and if the *Master* should find that she had, whether it would be for the benefit of the Parties interested that those Contracts should be carried into effect. The *Master*, by his Report, stated that Mrs. *Cann* had entered into the Agreement before mentioned, and also several other Contracts for the sale of different parts of the Testator's real estates, and that he was of opinion that it would be for the benefit of the Parties interested, that all the Contracts should be carried into effect.

By an Order made on a Petition presented by the Plaintiffs, the *Master's* Report, so far as it related to the Contracts with *Arscott* and another of the purchasers, was confirmed; and it was ordered that *Arscott*,

1823.

CANN

v.

CANN.

objecting to the Title to the estate which he had purchased, *but consenting to go before the Master upon such Title*, it should be referred to the *Master* to see if a good Title could be made thereto. On the third of this month the *Master* reported in favour of the Title. Upon which the Plaintiffs presented a Petition, praying that *Arscott* might be ordered to pay his purchase-money into Court, and that the Defendant and all other necessary Parties might be ordered to execute to him a proper conveyance of the estate which he had purchased. At the same time *Arscott* presented a Cross-Petition, praying that the *Master's* Report, so far as it found that a good Title could be made to the estate, might not be confirmed, and that he might be at liberty to except thereto.

Both these Petitions now came on to be heard.

Mr. Sugden and Mr. Knight, for Mr. *Arscott* :—

The defence made in favour of the Title is, that neither of the Commissions has been opened. But the question is, Whether, as this is not a purchase under the Decree of the Court, and as neither of these Commissions has been superseded, the existence of them is not such a cloud upon the Title, that the Court will not compel the purchaser to take it? *Lowes v. Lusk* (a); *Franklyn v. Lord Brownlow* (b). Sir S. Romilly's Act (c) makes the issuing of a Commission notice of a previous act of Bankruptcy. *Watkins v. Maund* (d). If either of these Commissions is proceeded with, the bargain and sale of the Commissioners will, beyond all doubt, pass the legal estate to the Assignees; and the purchaser will be compelled to file a Bill against the Assignees, to

(a) 14 Ves. jun. 547.

(b) Ibid. 550. See also *Powell v. Powell*, 6 Madd. 53.

(c) 46 G. 3. c. 135.

(d) 3 Camp. N. P. Rep. 308.

get the legal estate re-conveyed to him. Now this Court never forces a purchaser to buy a Suit in equity.

1823.

CANN
v.
CANN.

Mr. *Bell* and Mr. *Spence*, for the Plaintiffs:—

The Cases alluded to have not the least reference to the present question. These Commissions, though not superseded, are supersedable; and the Court will never let the Parties act upon them. Suppose the Court had directed a sale of this estate, could it have been contended by the Assignees that, because Mrs. *Cann* had committed an act of Bankruptcy before the Decree was pronounced, the Title to the purchaser failed? This estate being devised charged with debts, the Devisee is a Trustee; and therefore the estate would not, even at law, pass to the Assignees; for Courts of Law, in such Cases as the present, look at Trusts, and a Trust Estate is not considered as passing at Law. *Allanson v. Forster* (e). *Lowes v. Lush* was a Case where a Party, who had committed an act of Bankruptcy, had entered into a Contract for the sale of the estate. There was no Trust there; and the single question was, Whether this Court would compel a purchaser to take a Title so situated, there being a clear admitted act of Bankruptcy? It appears to me that this Case stands thus: Here is a person to whom property is given charged with debts; a Court of Equity declares this person a Trustee, and directs a sale, and that sale is given effect to in a Court of Equity. Can it be contended that, if a Commission of Bankrupt has issued against the Trustee, that is a good ground for a purchaser to resist the completion of his purchase? What this Party has done, has been done under the Decree of a Court of Equity; and the real question is, Whether, inasmuch as this is done

(e) 2 T. R. 479.

1823.

CANN
v.
CANN,

under the direction of a Court declaring a Trust, that must not be considered to be binding on all Parties? In Suits like this, if a Contract has been entered into before the Bill was filed, the Court never cuts down the Contract, but refers it to the *Master* to inquire whether it is a fair and proper Contract, and if the *Master* reports it to be a fair and proper Contract, the Court then directs it to be carried into effect. *Cary v. Crisp* (f); *Lempriere v. Pasley* (g).

The Suit amounted to a declaration of Trust, and it results to this question; Whether the Court will, or will not, proceed to sell a Trust Estate under these circumstances? The Decree has left no interest in this estate in the vendor; she has no interest except in the surplus of the purchase-money after the debts and legacies are paid. This is the same Case as if the estate had been sold under the Decree of the Court. For here the Court, finding this to be a proper Agreement to be carried into execution, adopts it as if it had been its own sale.

Mr. *Sugden*, in reply, cited the Case of *Hartley v. Smith* (h). Where the Court takes upon itself to decree a sale, the Court will compel a purchaser to take an equitable Title. But if the purchaser sells again, the Court will not compel the purchaser from him to take the Title. Lord *Waltham's* Case (i). Supposing this to be a Case where, if the estate had been sold under a Decree, the Court would have compelled the purchaser to take the Title, can the Court compel him to take it, when he merely consents to a reference to inquire whether a good Title can be made? This purchaser would be taken by surprise, if, when he consented to this

(f) 1 Salk. 108.

(g) 1 Buck, 368.

(g) 2 T. R. 485.

(i) Sug. Vend. 4th edit, 272.

1823.

CANN
v.
CANN.

reference, merely to save the expense of a Bill being filed against him for a specific performance of his Contract, and did not submit himself to any authority of the Court to make him take an equitable instead of a legal Title, the Court should compel him to take this Title. Mr. *Arscott* says he understood, when he came in under this Decree, that he was to be in the same situation as if a Bill had been filed against him. If this Lady had filed a Bill against the Purchaser, making all the persons interested in the distribution of the purchase-money Parties to the Suit, it would have been impossible for the Court to compel him to complete this Contract, unless the Parties could have assured to him the legal estate.

The VICE-CHANCELLOR :—

When this Purchaser became a Party to the reference to the *Master* upon the Title, it is not to be intended that he meant more than to place himself in the same situation upon the *Master's* Report, as he would have been in if the reference had been made in a Suit instituted for the specific performance of the Agreement; and in such a Suit he would not have been bound to accept this Title. It is stated, that what is thus generally to be intended was, in truth, the express understanding of the Party in this Case; and I must therefore dismiss the original Petition, and make an Order according to the prayer of the Cross-Petition.

Cooke v Statimer, l^o 3 M & K. 264 & cases cited

1823.
26th February.

JONES v MITCHELL and Others.

Will. Conversion.
Costs.

N. H. by Will, gave 800*l.* out of the Money to be produced by the sale of her Real Estates, to Trustees, for the benefit of certain charitable Institutions, and she gave the Residue of the money to *J. R.* The gift of the 800*l.* being void, her Heir is entitled to it, and not *J. R.*

The Costs of the Suit were ordered to be borne, proportionably, by the legacy of 800*l.* and the Residue of the produce of the Real Estate.

NANCY HOLT, by her Will, duly executed to pass Freehold Estates, devised all her Real and Personal Estates to the Defendants, *Mitchell* and *Bradley*, and to *J. Garlick*, deceased, (whom she also appointed her Executors,) their Heirs, Executors and Administrators; upon Trust, to pay the Rents and Profits of her Real Estates to her Brother, *Thomas Holt*, for his Life; and after his decease, upon Trust to pay the same Rents and Profits unto and amongst all his Children, their Heirs and Assigns; but in case her Brother should die without lawful Issue of his body, or, leaving such, all such Issue should die under the age of Twenty-one Years, then she directed her Trustees to pay the Rents of her Half Part of her Estate, called the *Box Trees*, to *Sarah Ratcliffe*, for her Life; and after her decease, she devised that Half Part to *S. Ratcliffe's* eldest Son, his Heirs and Assigns; and as to all the Residue and Remainder of her Real Estate, after her Brother's decease without lawful Issue, or leaving such, after his, her or their decease under the age of Twenty-one Years, she directed her Trustees to sell the same, and out of the Monies to be produced by the sale, to pay certain Legacies; and then to lay out the Sum of 800*l.* in the purchase of landed Property, and to convey and settle the Property, so to be purchased, in such manner as that the Rents and Profits thereof might be applied in manner following, for ever, (that is to say): One-fourth part to the Trustees, Directors, or Treasurer of the *Halifax Dispensary*, for the better support thereof, and the remaining Three-fourth parts to be divided

1823.

JONES
v.
MITCHELL,
and others.

amongst the Directors, Trustees or Treasurers for the time being, for ever, of the Three Sunday Schools established at *Halifax*, in equal Shares and Proportions; and upon further Trust, to lay out in their Names, at Interest, the sum of 60*l.* and to apply the Interest thereof from time to time, for ever, in maintaining and keeping in Repair the Family Vaults or Tombs of the late *Benjamin Holt*, *J. Holt*, and *William Holt*; and to pay all the rest, residue and remainder of the Monies, to arise from the sale of her Real Estates, unto *J. Ratcliffe*, for his own use and benefit. The Testatrix then disposed of her Personal Estate by giving several Legacies, and bequeathing the Residue to *J. Ratcliffe* for his own use.

On the 12th of August 1814, the Testatrix died, leaving *Thomas Holt*, her Brother, her Heir at Law.

Thomas Holt, by his Will, dated the 22d of July 1818, directed, that as to any Estate or Interest which, by virtue of the Will of his late Sister *Nancy Holt*, was vested in him, or which, from construction of Law, he might be entitled to as contingent, in Remainder, Reversion, or otherwise howsoever, all Interest or Profits thereof should be for the use and benefit of the Plaintiff, *Grace Holt*, for her Widowhood; and after her Decease or second Marriage, he gave all such Estate or Estates and Interest, to the Plaintiff, *J. G. Jones*, for his own use and benefit; and he also gave all the residue of his Real and Personal Estates to *J. G. Jones*, his Heirs, Executors and Administrators, and appointed him and *Grace Holt* Executor and Executrix of his Will.

In May 1820, *T. Holt* died, without Issue. After his decease, *Mitchell* and *Bradley*, (*Garlick* being then

1823.

JONES
v.
MITCHELL,
and others.

dead,) sold the Real Estates which *Nancy Holt* had directed to be sold, for 1,465 *l.* *J. G. Jones* and *Grace Holt* then filed a Bill against the Trustees and *J. Ratcliffe*, charging that the Bequest of the sum of 800 *l.* to the Charitable Uses, contained in the Will of *Nancy Holt*, was void, and that they were entitled to it as *Thomas Holt's* personal Representatives; and they prayed, that *Mitchell* and *Bradley* might be decreed to pay that Sum to them, out of the proceeds of the sale of *Nancy Holt's* Real Estates.

Ratcliffe, by his Answer, insisted that the Legacy of 800 *l.* was void under the 9 Geo. 2. c. 36. and sunk into the residue of *Nancy Holt's* Estate, for his benefit.

Mr. *Hart*, Mr. *Bell*, and Mr. *Duckworth*, for the Plaintiffs, cited *Cruse v. Barley* (a); *Hutcheson v. Hammond* (b); and *Wright v. Wright* (c).

Mr. *Cooper*, for the Defendant *Ratcliffe*:—

The Case of *Wright v. Wright* has no application, for the question in that Case was a question of Conversion; here the question is, Whether this Legacy of 800 *l.* does or does not fall into the residue? Under this gift of the residue of the produce of the Real Estate, the Defendant *Ratcliffe* is entitled to this Legacy. *Durour v. Motteux* (d).

(a) 3 P. W. 20. (b) 3 Bro. C. C. 128. (c) 16 Ves. 188.

(d) 1 Ves. 320.—The Will in this Case is not correctly stated in the Report, and as questions as to the conversion of Real into Personal Estate depend upon the particular expressions of the instruments under which they arise, the *Register's* Book has been consulted, and the following statement of the Will extracted from it.

Reg. Lib. 1749, A. fol. 253.

Timothy Motteux, by his Will, gave all his Estate, consisting in a Freehold and some Leasehold, Monies, Securities, Bonds, Stocks, Debts, both at home and abroad, Goods in Trade, both at home and abroad, Household Goods, Plate, Jewels, Linen,

Ackroyd v. Smithson (c). In the latter of these two Cases, the question arose between the Heir at Law and the next of Kin, and it was admitted that there was

1823.

JONES
v.
MITCHELL,
and others.

Wearing Apparel, and all he had, or might have, or claim to, of what kind soever, or wheresoever, upon Trust to sell and dispose of all his Freeholds, Leaseholds, Monies, Securities, Bonds, Stocks, Debts, both at home and abroad, Goods in Trade, both at home and abroad, Household Goods, Plate, Jewels, Linen, Wearing Apparel, and all he had, or might have, or claim to, of what kind soever or wheresoever, and after payment of all his Debts, Funeral Expenses and Legacies, to put or place out all the residue of his Personal Estate at interest, upon government or other securities, in the names of his Trustees, upon Trust that they should pay and apply the interest and produce arising thereby between the persons therein after mentioned, during their joint lives; and, after the death of either of them, then to pay to the survivors also during their joint lives; and, after their death, then to pay the whole produce to the last survivor for life; and then to pay and apply the said residue and the principal, unto and amongst the respective children, lawfully begotten, of those he had thereafter mentioned, to be entitled to a share of the interest or produce of the Overplus, to be equally divided. The Testator then gave several Legacies, some to individuals, and others for charitable purposes, and amongst them the legacy of 12,000 *l.* mentioned in the Report; and the remainder of his estate and the interest thereon, being placed out at interest in some of the funds, the yearly interest, be it what it would, the Testator ordered to be paid quarterly to and amongst the following persons, if alive, share and share alike; (if any should sell or transfer their right to it, then, in such case, that person or their representative to be cut off and go amongst the rest),—to the Plaintiff *P. Motteux*, jun. one full quarter part; to the Plaintiff *Stephen Hubert*, one full quarter part; to the Defendant *Susannah Jarvis*, one full quarter part, and to the Defendant *Magdalen Foulle*, one full quarter part: to these two last to be paid into their own hands, on their own receipts, so that their husbands might have no right to it; and, after the decease of the longest liver of the said four, or of those that should not have alienated their claim, he desired that the principal of the residue of his estate should be divided and go to and amongst the children gotten, or to be begotten, by the said Plaintiffs *P. Motteux*, jun. and *Stephen Hubert*, and the Defendants *Susannah Jarvis* and *Magdalen Foulle*, as was before explained; and he appointed the Plaintiffs *Francis Motteux*, *James Daniel Hubert*, *Stephen Hubert* and *P. Motteux*, jun. Executors of his Will.

(c) 1 Bro. C. C. 502.

1823.

JONES
v.MITCHELL.
and others.

a distinction between a claim made by Residuary Legatees and one made by the next of Kin. So also in *Williams v. Coude* (f), the question was between the Heir at Law and the next of Kin; but both in the Argument and the Judgment a distinction was drawn between the Residuary Legatee of the produce of Real Estate and the next of Kin. The Case of *Durour v. Motteux* was followed in *Kennell v. Abbott* (g).

The VICE-CHANCELLOR :—

The Will, as to Personal Estate, speaks at the time of the death of the Testator, and the Residuary Legatee takes, not only what is undisposed of by the expressions of the Will, but that which becomes undisposed of at the death, by disappointment of the intentions of the Will. It is otherwise as to the Residuary Devisee of Real Estate, or of the price of Real Estate. As to him, the Will speaks only at the time of making it, and he can take nothing but what is at that time intended for him. The Devisor, at the time of making the Will, intended that the Residuary Devisee of the price of the Land should take such Residue, subject to the deduction of the 800*l.*, and not the 800*l.*; which is therefore undisposed of, and results to the Heir. In *Durour v. Motteux*, the Devisor included the residuary price of his Land in the general gift of all his Personal Estate, and therefore it was contended that it was the purpose of the Testator that it should pass as his residuary Personal Estate would do (h).

3d May.

This Cause having been set down for the purpose of

(f) 10 Ves. 500.

(g) 4 Ves. 802.

(h) All the Cases upon the subject of the conversion of Real into Personal Estate, are considered in *Smith v. Claxton*, 4 Madd. 484.

the Costs being disposed of, Mr. *Cooper* contended that they ought to be paid wholly out of the 800*l.*, and he cited *Jenour v. Jenour* (i).

1823.
JONES
v.
MITCHELL,
and others.

The VICE-CHANCELLOR:—

The question does not arise upon the 800*l.*, but upon the construction of the residuary Clause in the Will; for the 800*l.* is clearly a lapsed Legacy: and the justice of the Case requires that the Costs of this Suit should be borne proportionably by the 800*l.*, and the surplus produce of the Real Estates after paying the 800*l.* I must therefore order, that the Costs of all Parties shall be paid, in the first place, out of the produce of the Real Estates, and then that a fair proportion of them be deducted out of the 800*l.*

(i) 10 Ves. 562.

WILLIAM PARKER and JAMES DOWIE, Plaintiffs,

AND

WILLIAM FAIRLIE, JOHN HUTCHESON FERGUSON, DAVID CLARK, PETER REIERSON, JOHN MELVILLE, and JOHN SMITH, Defendants.

1823.
10th March, and
17th April.

THE Plaintiffs were the surviving Partners of the house of *Parker, Yeoward, and Co.* Merchants, of London; which house had, in the years 1817 and 1818, been engaged in various mercantile transactions with the Defendants, then carrying on business as Merchants at *Calcutta*, under the firm of *Fairlie, Ferguson, and Co.* him to the Plaintiffs was of inferior quality, said, that from certain Affidavits and Certificates made by experienced persons, he believed the Cotton to be of a superior quality, and set forth the Affidavits and Certificates, in a schedule, in *hæc verba*: held, that the schedule was not impertinent.

Answer. Impertinence.

A Defendant, in answer to an allegation in the Bill that some Cotton which had been sent by

1823.

PARKER
v.
FAIRLIE
and others.

The Plaintiffs' house having, by letter, instructed the Defendants to purchase and send home on their account Cotton, the produce of the *East Indies*, the Defendants in the year 1818 shipped, on account of the Plaintiffs' house, a certain quantity of Cotton on board a vessel belonging to that house, then on her return voyage to *England*. But the Plaintiffs contended, that in the purchase of such Cotton, the Defendants had deviated from the instructions given them, in respect to both the quality and the price of the article. The Cotton came home, and was sold by consent and without prejudice, and a considerable loss was incurred by the sale.

The Bill prayed, in substance, that an account might be taken of the several dealings and transactions between the two houses, and of the goods shipped and consigned by the house of the Plaintiffs to the Defendants, and of the produce of the sales thereof; and of the several sums of money received or paid by the Defendants on account of the Plaintiffs' house from the 1st of January 1818; and that in taking such accounts the Defendants might not be allowed to charge the Plaintiffs' house with the cost of the Cotton in question, beyond the amount of the net proceeds of the sale; and that the Defendants might be decreed to pay to the Plaintiffs what might be found due to them upon taking such accounts, (the Plaintiffs being willing to make to the Defendants all just allowances, and to pay what, if any thing, was due to them), and that, in the mean time, the Defendants might be restrained from proceeding against the Plaintiffs at law in respect of the Cotton.

The Bill, after setting out the written instructions from the Plaintiffs' house to the Defendants, charged, (among other things) that the Cotton in question was of

a very inferior quality, and could not even be considered as fair ordinary Cotton, and described the same as very leafy and of a bad colour. The corresponding interrogatories were: "Whether such Cotton was not of very inferior quality, or how otherwise? and whether the same could be considered, or was, in fact, fair ordinary Cotton? And whether such Cotton was not leafy and of a bad colour?"

1823.

PARKER
v.
FAIRLIE
and others.

The Defendant *Fairlie*, by his Answer, stated that he had not at any time during the dealings and transactions between the said two houses, or during the years 1817 and 1818, had any personal concern in, or any cognizance of, the said dealings and transactions, he having been from the year 1810 up to the then present time resident in this country. He also admitted, in reference to a statement to that effect in the Bill, that the Defendants *Clark*, *Reierson*, *Melville*, and *Smith*, were respectively resident at *Calcutta*, or elsewhere, out of the jurisdiction of the Court; and to the interrogatories above cited he answered as follows:—

"And this Defendant further answering, positively denies, as to his information and belief, that such last mentioned Cotton was of a very inferior quality; and on the contrary, he believes the same would be considered, and was in fact superior to fair ordinary Cotton, and was so held and considered accordingly; and as evidence thereof, this Defendant saith, that he hath received divers Certificates and Affidavits, which, since the raising of the question now pending between the said Firms of the said Complainants, and *Fairlie*, *Ferguson and Co.* respectively, the said other Defendants, now in *India*, have caused to be duly made there, by divers persons, who, (as this Defendant has been

1823.

PARKER
v.
FARRIE
and others.

informed and believes,) were well acquainted with such last mentioned Cotton, at or about the time of the same being so bought on account of the said Complainants said Firm as aforesaid, or with other Cotton of the same sample, and are experienced in and well acquainted with, and good and competent judges of the article of Cotton in general, as grown in the *East Indies*; and certain of which Affidavits in particular this Defendant saith were made by the persons employed in the process of packing and screwing down the said Cotton for shipment; in which process, this Defendant saith, every part and single pound of the article doth and must necessarily undergo the minutest inspection and examination, and is in fact far more accurately inspected and judged of than it can possibly be by the most skilful Broker or other persons or person in *London*, judging of the contents of entire bales of the article from small or comparatively small samples thereof; and that such persons do, in their said several Certificates and Affidavits, give their opinions and judgments respectively, as to the qualities or price of the said Cotton; and from such Affidavits, this Defendant doth collect and confidently believe that such Cotton was superior to a fair ordinary quality, and to be classed with the best description of *Bengal* Cotton procurable in *Calcutta* at the time, and was of a fair and reasonable price, or to the like effect. And this Defendant saith he hath, in the second Schedule to this his Answer annexed, and which he prays may be taken as part thereof, set forth fully and at large the words and figures, and all and every the contents and particulars of the said several Certificates and Affidavits respectively, with the names and descriptions of the several persons by whom the same, and every of them, were and was respectively made or sworn. And this Defendant also positively

denies, as to his information and belief, that such Cotton was leafy and of a bad colour."

1823.

PARKER
v.
FAIRLIE
and others.

The Affidavits and Certificates referred to contained Attestations, by persons who stated themselves to be acquainted with the qualities and value of Cotton the produce of the *East Indies*, to the goodness of different parts of the Cotton in dispute; but one of them also spoke to the quality of certain Sugar which the Defendants had consigned home to the Plaintiffs' house in the same cargo with the Cotton, and about which some question subsisted, though not in this Suit. There was also an Affidavit from the Defendant *Clark*, the leading Partner of the Defendants' house in *India*, identifying the Cotton mentioned in the Certificates and in the other Affidavits, with that mentioned in the Invoice and Account Current annexed to his Affidavit, that is, with the Cotton in question in this Suit. The Invoice, likewise, was set out in the Schedule; and it stated the particulars, not only of the Cotton, but of the Sugar and other articles comprised in the same cargo, as well as certain charges for Coolie-hire, and other Expenses, and for Commission, not mentioned to belong particularly to the Cotton, but appearing to relate to the whole cargo. Further, there was set out in the Schedule an Attestation by a Notary Public, verifying the several Affidavits in the usual manner.

The Answer having been excepted to for Impertinence, the *Master* (among other things) reported the whole of the Schedule in question to be impertinent. The Defendant *Fairlie* thereupon filed Exceptions to the *Master's* Report; one of which was for having reported the Schedule impertinent; and that Exception now came on to be argued.

1823.

PARKER
v.
FAIRLIE
and others.

Mr. *Bell*, and Mr. *Grant*, in support of the Exceptions,

Mr. *Horne*, and Mr. *Palmer*, for the Report.

In answer to an inquiry from the *Vice-Chancellor*, whether any parallel reported Case could be produced, the Counsel on both sides said that they were not aware of any such Case. His *Honor* having also observed that the first mention of the Certificates and Affidavits in the Answer was introduced with the words "as evidence," the Counsel for the Defendant pointed out the subsequent passage in the Answer, in which it was stated, "that from such Affidavits the Defendant positively believed that the Cotton was superior to Cotton of a fair ordinary quality, and to be classed with the best description of *Bengal* Cotton procurable in *Calcutta* at the time, and was of a fair and reasonable price."

The VICE-CHANCELLOR:—

17th April.

The *Master* has considered this matter as impertinent, not because it is irrelevant, but because he thinks it useless. He has not considered it impertinent that the Defendant should refer generally to the Affidavits and Certificates in question, as forming the grounds of his belief with respect to the quality of the Cottons; for he has permitted the passages in the Answer to that effect to stand unimpeached; but he considers it impertinent, that is, useless, to state the very language of the Affidavits and Certificates. I concur with the *Master* in thinking that the Defendant was well justified in referring to the Affidavits and Certificates, as forming the grounds of his belief, and adding weight and credit to it; but as the degree of weight and credit

depends upon the particular language of the Affidavits and Certificates, I cannot think it useless, on the part of the Defendant, to set them forth *in hac verba*.

Exception allowed.

1823.

PARKER

v.

FAIRLIE
and others.

SILCOX v. BELL.

Charge "Goodyer" 5 Rep. 14

1823.

11th March.

WILLIAM READ, deceased, by his Will, duly executed to pass Freehold Estates, gave Freehold, Copyhold, and Leasehold Estates to Trustees upon certain Trusts, for the benefit of the Children of his Nephew *William Bell*. And in case there should be no Children of his Nephew *William Bell*, then upon Trust to sell and dispose of those Estates, and to pay and divide the Monies arising by such sales, after deducting the expenses of the Trusts, unto and amongst his several Relations therein named: and in case there should be any other Relations of his that could prove themselves, to the satisfaction of his Trustees and Executors, to be either the first or second Cousins to him, or the Representatives of such first or second Cousins, he directed that his Trustees and Executors should consider them as actually entitled with those whom he had particularly described, and that they should pay and distribute their respective shares and proportions to them in such manner, at the same time, and in such shares and proportions, as he had in his Will directed respecting his other Relations therein by him particularly mentioned and described. And the Testator devised the Copyhold Estate which he purchased of *F. Fane*, esquire, to the same Trustees, and to the Survivors of them, and the Heirs, Executors, Administrators and

*Will. Construc-
tion. Devise to
1st & 2d Cousins.*

Where the Decree referred it to the Master to inquire whether a Testator left any Relations of the degree of 1st or 2d Cousins; held that 1st Cousins, twice removed, ought to be included in the Report.

1823.

SILCOX
v.
BELL.

Assigns of such Survivor, upon Trust to sell and dispose of the same, and out of the Money arising therefrom, after paying the expenses attending the Sale and the Trusts thereby created, to pay and divide the residue of the Monies arising by such Sale, unto and amongst his several Relations thereinbefore particularly named and described, and such other of his Relations as should prove themselves to be his first or second Cousins as aforesaid, in equal shares and proportions.

By the Decree made on the hearing of this Cause, the *Master* was ordered to inquire and state to the Court, (amongst other things) "whether the Testator left any Relations of the degree of first or second Cousins, or Representatives of such first or second Cousins."

The *Master*, by his Report, certified that four Persons, whom he mentioned by their Names, and who appeared from their Pedigrees, which he stated in his Report, to be the Great-Grandchildren of the Testator's Uncles and Aunts, were the second Cousins of the Testator living at his decease.

To this Report, the Plaintiff *Silcox* excepted.

Mr. *Horne* and Mr. *Ellison*, in support of the Exception, contended that, by the Decree, the *Master* was directed to inquire only who were the first and second Cousins of the Testator; and that the persons named in his Report, were neither the Testator's first nor his second Cousins.

Mr. *Sugden* and Mr. *Roupell*, in support of the *Master's* Report:—

The Case of *Mayott v. Mayott* (a) has established,

(a) 2 Bro. C. C. 125.

that it is not material by what name the Relations are designated, provided they are within the degree of relationship which the Testator meant to include in his Bequest. The Court had that in view in making the Decree; because it did not refer it to the *Master* to inquire who were the Testator's first and second Cousins, but who were of the Degree of first and second Cousins to the Testator. As the Rule is, in ascertaining the degree of relationship in which one person stands to another, to count up to the common Ancestor, and then down again to the person whose relationship is sought, the first Cousin twice removed, is related to the *propositus* in the same degree as his second Cousin; for they are both in the sixth degree; and therefore, in point of propriety of language, as well as in law, all persons who are of the sixth degree are second Cousins.

1823.

SILCOX
v.
BELL.

The VICE-CHANCELLOR:—

The *Master* is wrong in the terms of his finding; for these persons are not the Testator's second Cousins, but his first Cousins twice removed; and I must, therefore, allow the Exception. But as I am of opinion, that all persons who are within the degrees of relationship mentioned in the Will, are within the intention of the Testator, I shall, at the same time, make a Declaration, that the persons named in the Report are of the degree of second Cousins.

1823.
15th March.

Duffield v. Elwes ante 239

WHEELER v. WARNER and Others.

*Will. Legacy
upon Marriage
with Consent.*

I. W. bequeathed 10,000*l.* Stock to Trustees, in Trust to pay the Dividends to his Daughter whilst she remained single; and provided she married with the consent of his Trustees, he authorized them to advance to her Husband such part of the Stock (not exceeding one-third) as they thought proper, and he declared certain Trusts of the remainder for the benefit of his Daughter and her Children. But if she married without the consent of the Trustees he declared certain Trusts of the whole fund, for the benefit of his Daughter and her Children. She married in *I. W.*'s lifetime, and without his consent, but he was afterwards reconciled to the marriage; held that the Husband was entitled to one-third of the Stock, and that the remainder was to be held upon the same Trusts as it would have been had the Daughter married after *I. W.*'s death, and with the Trustees' Consent.

ISAAC WARNER, by his Will, dated the 7th of August 1818, after giving 4,000*l.* to his wife *Mary Warner*, and his son *Simeon Warner*, upon certain Trusts, for the benefit of his daughter *Mary Allen* and her children, gave to the same persons 10,000*l.* three per cent Reduced Annuities, upon Trust to pay the Dividends thereof to his daughter *Sophia Warner*, during such part of her life as she should remain single, and until she should be married with the consent of his wife and son, or the survivor of them, and such Consent should be certified in writing. And he declared that, in case his daughter *Sophia* should at any time after his decease, with the consent and approbation of his wife and son, or the survivor of them, (such Consent to be certified by some writing under their hands) intermarry with any person to be approved of as aforesaid, then his Trustees, or the Survivor of them, his or her Executors or Administrators, should transfer and pay to the person to whom she should be so married, with such Consent as aforesaid, such part of the 10,000*l.* three per cent Reduced Annuities, and other the monies or securities to which she should then be entitled under his Will, as his Trustees or Trustee should think fit, (so that the same did not exceed one-third part thereof,) for the sole use of such husband; and after the marriage of his daughter *Sophia*, with such Consent and Approbation as aforesaid, and, after such payment or transfer to her husband, to pay the interest and dividends of the residue of the money so invested, or to which she might thereafter be entitled

1823.

WHEELER
T.
WARNER
and others.

under his Will, into her proper hands, so that such Interest and Dividends might be for her sole use, and at her disposal amongst her children by her said husband, or any after-taken husband, at such time or times as therein mentioned respecting *Mary Allen's* children: And upon further Trust, in case such Marriage of his daughter *Sophia* should be so had and solemnized with such Consent as aforesaid, and she should die in the lifetime of any such husband, then, after her decease, to pay the Interest and Dividends, last mentioned, into the proper hands of such husband, during his natural life, or so long as he should remain solvent, and be permitted to receive the same for his own use; and, after the decease of his daughter *Sophia*, and any such husband to whom she should have been married with such Consent as aforesaid, or from and after the insolvency of any such husband, or his becoming incapable, by assignment or other act of law, of receiving such Dividends or Interest for his own use, then to transfer, pay and divide the whole of the Money so invested or set apart for his daughter *Sophia*, and all Interest then due and unexpended, unto and amongst such of her children, by any husband or husbands with whom she might intermarry with such Consent as aforesaid, as should be living at her decease, and as she should, in the manner therein mentioned, appoint: And in default of any such Appointment by her after any such Marriage, or in case of any defect therein, then upon Trust, as soon after the decease of his daughter *Sophia*, after such Marriage, as circumstances would permit, to divide the Trust Funds amongst her children who should attain the age of twenty-one years. But in case his daughter *Sophia* should be married without such Consent as aforesaid, then he declared that his Trustees should, from and after any such Marriage without such Consent and Appro-

1823.

WHEELER

v.

WARNER
and others.

bation, pay, from time to time, the whole of the Interest and Dividends of the 10,000 *l.* three per cent Reduced Annuities, into her proper hands, during her life, as if she were single and unmarried, and notwithstanding any such Marriage; and from and after any such Marriage of his daughter *Sophia* without such Consent as aforesaid, and from and after her Decease, then to pay, transfer and divide the Trust Funds to and amongst her children who should attain the age of twenty-one years. And he gave the Residue of his Estate and Effects to the same Trustees, in Trust to sell and dispose of such parts thereof as should be in their nature saleable, and get in all other his Monies and Securities for Money; and he directed, that the Money arising from such Sales, and so to be got in, should be equally divided amongst his son *Simeon* and his daughters *Mary* and *Sophia*, but that, nevertheless, the Shares of his daughters should be invested in government securities, in addition to the sums of 4,000 *l.* and 10,000 *l.* before directed to be invested for their separate use and disposal; and that their Shares should be subject to the same Limitations, as had been before mentioned respecting the Stocks or Funds so given or settled upon or for them respectively: And he appointed his wife and son Executrix and Executor of his Will.

On the 22d of January 1822, the Testator died.

Sophia Warner, in the lifetime of her father, and after he had made his Will, intermarried with *Robert Wheeler*; and after her Father's death, she with her Children filed a Bill against the Trustees of her Father's Will, her Husband, and Mr. and Mrs. *Allen* and their Children, for the purpose of having the usual Accounts taken of

her Father's personal Estate, and the Rights and Interests of all Parties therein ascertained and declared.

823.

WHEELER

v.

WARNER
and others.

The Bill stated, that the Marriage of Mr. and Mrs. *Wheeler* was had with the consent of the Testator. But the Trustees, in their Answer, denied that statement; and added, that the Marriage was had without even the knowledge of the Testator, but that they believed he was afterwards reconciled to Mr. and Mrs. *Wheeler* and to their Marriage; and they said, that they had divided the residue of the Testator's personal Estate into Three equal Shares: that *Simeon Warner* had appropriated to himself one of such Shares; that they had transferred into their own Names another of such Shares, upon the Trusts declared by the Will, for the benefit of Mr. and Mrs. *Allen* and their Children; and that the remaining Share, and also the sum of 10,000 *l.* Bank three per cent Annuities, were then standing in the Testator's name, in the books of the Governor and Company of the Bank of *England*, to abide the decision of the Court.

By the Decree, it was referred to the *Master* to inquire, whether Mr. and Mrs. *Wheeler's* Marriage was had with the consent of the Testator; and if not, whether it was subsequently approved of by him, or whether he was afterwards reconciled thereto.

The *Master*, by his Report, found that the Testator and his Wife had, for many years previous to the year 1818, been on very friendly terms with Mr. *Wheeler's* family; and that, in October 1818, it was arranged between the parents of both parties, that the Plaintiff, Mrs. *Wheeler*, should go to visit Mr. *Wheeler's* family

1823.

WHEELER
v.WARNER
and others.

at *Birmingham*, where they resided; but that when the period of her departure arrived, the arrangement was objected to by Mrs. *Warner*, who observed that she was aware of the attachment that existed between Mr. *Wheeler* and her Daughter; and that, if she was permitted to go to *Birmingham*, a Marriage would be the consequence; but the Testator said, he had promised his Daughter she should go, and that he would not disappoint her: that Mr. *Wheeler*, before Mrs. *Wheeler* went to *Birmingham*, had visited at the Testator's house, and staid there for several days at a time, with the Testator's knowledge and approbation: that in January 1819, the Plaintiff, Mrs. *Wheeler*, went on her visit to Mr. *Wheeler*'s family, and that in March following the Marriage took place, without either Party having asked their parents Consent. And the *Master* also found, that in May, and again in August in that year, Mr. and Mrs. *Wheeler*, in consequence of invitations from the Testator, went and staid at the Testator's house, and were treated by him and his Wife in every respect as members of their family, and that Mr. *Wheeler* was introduced by them to their friends and acquaintance as their Son-in-law; and that the Testator, then and before, appeared reconciled to the Marriage, and approved thereof. And the *Master* found a variety of other facts, from which it clearly appeared that a friendly intercourse subsisted between the Testator and Mr. and Mrs. *Wheeler* down to the time of the Testator's decease; and he certified, that the Marriage was not had with the Testator's consent; but that it was subsequently approved of by him, and that he was afterwards reconciled thereto.

The Cause now came on to be heard for further Directions.

Mr. *Wingfield*, and Mr. *Wigram*, for the Plaintiffs:—

The question is, whether, if a Father gives a fortune to a Child, and annexes, as a condition to the gift, that she shall marry with Consent, and she marries without Consent, but the Father afterwards approves of the match; the Court will say that the Marriage was had with the Father's Consent? It may be said, that under the circumstances of this case, this lady's fortune is to be subject to the same Trusts as if she had married after her Father's death, with the consent of the Trustees; for as she married in her Father's lifetime, it was impossible that she should have had the consent of the Trustees, and that therefore she cannot be said to have married without their Consent. But the Testator may have considered that the event which had happened was provided for by his Will; and may, under that impression, have forborne to alter his Will.

1823.
WHEELER
v.
WARNER
and others.

Mr. *Sugden*, and Mr. *W. Blackburn*, for the Defendant *R. Wheeler*:—

The Case of *Parnell v. Lyon* (a) is directly in point, and entirely disposes of the question in this Case. The Marriage which the Testator contemplated was a marriage after his death. The Case here is rather stronger than if the Father had merely been reconciled to the Marriage after it had taken place; for it appears, by the Master's Report, that the Father knew of his Daughter's attachment to Mr. *Wheeler*, and that although he was cautioned against permitting her to visit his friends at *Birmingham*, yet he said he would not disappoint her. *Clarke v. Berkeley* (b).

(a) 1 V. & B. 479.

(b) 2 Vern. 720.

1823.

WHEELER
v.
WARNER
and others.

Mr. *Bell*, and Mr. *Rose*, for the Trustees :—

The Testator in this Case himself points out the alterations which are to be made in the disposition of the property, in case his Daughter marries without Consent. He says, "If she marries without Consent, I give the income to her for her life, and after her death, the capital to her Children absolutely." So that he does not entirely deprive her of the property in case she marries without the consent of his Trustees. Now in *Parnell v. Lyon* there was a clause, by which the principal of the Daughter's share of the residue was taken away from her Children if she married without Consent. Here there was no Consent, but there was a Reconciliation; and that is quite consistent with a qualified gift. And the Testator most probably considered that his subsequent reconciliation would not have the same effect as to the disposition of the property, as if the marriage had been had with his Consent. Besides, this Case has one ingredient in it which distinguishes it from all the Cases that have been cited; for here the Will leaves it in the discretion of the Trustees, in case the Daughter marries with their Consent, to advance to her Husband any part of her fortune not exceeding one-third. That discretion the Trustees are still entitled to exercise.

Mr. *Hart*, and Mr. *Barber*, for the Defendants Mr. and Mrs. *Allen*.

The VICE-CHANCELLOR :—

The authorities cited establish this proposition: That a marriage in the lifetime of the Father, with his consent or subsequent approbation, is equivalent to a marriage after his death with the consent of the Trustees; and the directions must be given according to the pro-

visions of the Will in that event. Here the Trustees have a discretion, in the event of a marriage with their Consent, to give to the Husband any portion of the 10,000*l.* stock, not exceeding a third part. But this discretion in the Trustees is incident only to their authority to consent to the Marriage; and this provision is now to be considered as a gift to the Husband of one-third part of the 10,000*l.* stock.

1823.

WHEELER
v.
WARNER
and others.

WEBBER v. WEBBER.

WILLIAM WEBBER, by his Will, dated the 21st of December 1794, gave to each of his daughters, *Sarah* and *Mary Elizabeth*, the sum of 10,000*l.* on their respective marriages. And in case their mother should die before they were married, then after her decease he gave them an Annuity of 1,200*l.*, to be equally divided between them, so long as they both continued unmarried; and after the marriage or death of either of them, after the death of their mother, he gave to the other, in lieu of her moiety of the Annuity of 1,200*l.*, an Annuity of 800*l.* so long as she continued unmarried.

Sarah Webber, one of the daughters, married in the Testator's lifetime. In November 1796 the Testator died, leaving *Sarah Webber*, his widow, and his two daughters, surviving.

A Suit having been instituted for the administration of the Testator's personal Estate, and the *Master* having reported that all the Testator's Debts and Legacies, except the 10,000*l.* given to *M. E. Webber*, had been

1823:
20th March,
and
31st May.

*Contingent
Legacy.*

Where a Legacy is given upon a contingency, and a Suit is instituted for the administration of the Testator's Estate, the Court does not direct a sum of Stock, belonging to the estate, to be appropriated to pay the Legacy when the contingency happens; but directs the whole residue to be paid over to the Residuary Legatee on his giving security to pay the Legacy when due.

1823.

WEBBER

v.

WEBBER.

paid; and that 16,000*l.* Bank three per cent Annuities, part of the funds in the Cause, were, according to the market price of such Annuities on the day mentioned in his Report, of the value of 10,000*l.* that sum was carried over to Miss *Webber's* account, subject to the contingencies mentioned in the Will concerning her Legacy.

On the 6th of May 1819 *Sarah Webber*, the widow, died; upon which Miss *Webber* presented a Petition, insisting that, in the events that had happened, she was entitled, under her father's will, to an Annuity of 800*l.* Upon this Petition an Order was made, directing two sums of 13,333*l.* 6*s.* 8*d.* Bank Annuities, part of the funds in the Cause, to be appropriated to answer the Annuity.

Under these circumstances a Petition was presented by some of the other Parties to the Suit, submitting that, as Miss *Webber* could not be entitled both to the Legacy and the Annuity, the two sums of 13,333*l.* 6*s.* 8*d.* Bank Annuities, would at all times be a sufficient fund to answer the Legacy as well as the Annuity; and therefore praying that the *Accountant-General* might be ordered to carry over the 16,000*l.* Bank Annuities from Miss *Webber's* account to the credit of the Cause generally; and that it might be declared that the two sums of 13,333*l.* 6*s.* 8*d.* Bank Annuities, should be a fund for answering, not only the Annuity of 800*l.*, but also the Legacy of 10,000*l.*

Mr. *Bell*, and Mr. *Farrer*, for the Petitioners.

The VICE-CHANCELLOR:—

31st May.

This Legatee being entitled to receive a certain sum

in money when the event of her marriage happens, her Legacy is not capable of being secured by the present appropriation of any sum of Stock. Let the Residuary Legatee receive the whole fund in Court upon giving security, to the satisfaction of the *Master*, for the payment of the Legacy if the event happens. It may be secured upon land if he has land, or by a loan of money upon land.

1823.

WEBBER
r.
WEBBER.

TURNER v. ROBINSON and Others.

1821.
27th March.

WILLIAM WOOLCOTT, deceased, by his Will, after giving several Legacies, bequeathed the residue of his Estate to Trustees, upon Trust, within one year after his youngest child should attain the age of twenty-one years, to sell and dispose thereof, and to divide the monies arising from the sale equally amongst all his children, share and share alike; and he directed that the shares of such of them as were sons should be paid to them as soon as such shares could be ascertained, and that the shares of such of them as were daughters should be laid out on government or real securities, in the names of his Trustees, upon Trust to pay and apply the Interest and Dividends arising therefrom for their separate use; and that their shares of the capital stock or principal money should be disposed of, after their decease, to such persons as they, by any Deed or Writing under their hands and seals to be duly executed, or by their last Will and Testament in writing, to be executed in like manner, should appoint.

Multifariousness.

Where under a Will the Residuary Legatees are also Appointees of a share of another Testator's Estate a Bill filed by them for an account of both Estates, is not multifarious.

But see
Marcos v. Rebus
3 Sim. 466. contra

The Testator left ten children surviving him. Mrs. *Esmand*, one of those children, and the mother of the Plaintiffs Mrs. *Turner* and Miss *Esmand*, by her Will,

1821.

TURNER
v.
ROBINSON
and others.

(which was executed so as to be a due execution of the Power given to her by her father's Will) disposed of all her Interest, to be derived under that Will, in favour of Mrs. *Turner* and Miss *Esmand*, and also gave them the residue of her own personal Estate.

The Bill was filed against the personal Representatives of both *William Woolcott* and Mrs. *Esmand*, and against the surviving children of the former; and, after stating the Wills of *W. Woolcott* and Mrs. *Esmand*, it contained the usual Charges as to their personal Estates, possessed by their respective personal Representatives, and prayed that the Trusts of those Wills might be carried into execution; that an Account might be taken of *W. Woolcott's* personal Estate possessed by his personal Representatives; that the Plaintiffs shares of the Residue of that Estate might be paid to them; and also, that an Account might be taken of Mrs. *Esmand's* personal Estate possessed by her personal Representative, and that he might be decreed to make good to the Plaintiffs what should appear to be due to them on the taking of that Account.

To this Bill the Defendants *John Doubleday* and *Elizabeth* his wife (the latter being one of the daughters of *William Woolcott*) demurred, for multifariousness.

Mr. *Simons*, in support of the Demurrer, admitted that if the Accounts prayed for by the Bill had been confined to the Property which Mrs. *Esmand* took under *William Woolcott's* Will, the Bill would not have been multifarious; but he contended, that as it was not so confined, but went on to pray for an account of Mrs. *Esmand's* general personal Estate, it was multifarious; and that the Defendants, who were interested in *William Woolcott's* Estate only, were not to be kept before the Court whilst the Accounts of Mrs. *Esmand's* Estate were being

taken, which might be very voluminous, and occupy a great length of time.

1821.

TURNER

v.

ROBINSON
and others.

Mr. *Roots*, in support of the Bill.

The *Vice-Chancellor* said, that as the Plaintiffs' Title to their Shares of *William Woolcott's* Estate and to Mrs. *Esmand's* Estate were derived under the same instrument, they were entitled to unite the Accounts of both Estates in the same Suit; and that, therefore, the Bill was not multifarious (a).

Demurrer overruled.

(a) This Case is reported in 6 Madd. 94, under the name of "*Turner v. Doubleday*;" but the facts are not stated correctly.

JONES v. CROUCHER and Others.

1822.

1st February.

OLIVE CROUCHER being entitled to the sum of 1,344 *l.* 0 *s.* 8 *d.* Bank Annuities, in reversion expectant upon the decease of *Betty Croucher*, by an Indenture dated the 6th of August 1791, directed the Trustees in whose names the Stock was standing, to stand possessed of it, after *Betty Croucher's* decease, in Trust to pay the Dividends to her and her Assigns, for her life; and after her decease, in Trust for the Defendants, *Henry Croucher Butler* and *James Butler* the younger, their Executors, Administrators and Assigns. By an Indenture dated the 22d of May 1793, *Olive Croucher*, without taking any notice of the Indenture of the 6th of August 1791, assigned her reversionary interest in a moiety of the Stock to *Thomas Jones*, to secure the repayment of 500 *l.*

Voluntary Settlement.

Voluntary settlements of personal Property, made by persons who are not indebted at the time, are good against a subsequent Purchaser for valuable consideration.

1822.

JONES

v.

CROUCHER
and others.

In February 1805, *Betty Croucher* died. *Thomas Jones* also died, having appointed the Plaintiff his Executor.

The Bill, after stating these facts, charged that the Indenture of the 6th of August 1791 was voluntary, and made without any good consideration, and that it was fraudulent, and void against the Plaintiff; and it prayed that a moiety of the Stock might be sold, and the monies arising from the sale be applied in payment of what was due to the Plaintiff under the Indenture of the 22d of May 1793.

The Defendant *Henry Croucher Butler*, by his Answer, insisted that the Indenture of the 6th of August 1791 was good and valid against the Plaintiff, even though it were merely voluntary. The Defendant *James Butler*, the younger, did not appear to the Bill.

There was no evidence to show that *Olive Croucher* was indebted to any person at the time when she executed the Assignment of the 6th of August 1791, or that *Thomas Jones* had any notice of that Assignment.

Mr. Horne, and *Mr. Blake*, for the Plaintiff, insisted that as the Plaintiff was a purchaser for a valuable consideration, and as the Assignment of the 6th of August 1791 was merely voluntary, it must be held to be void as against him by 27 Eliz. c. 4.

Mr. Bell, and *Mr. Moore*, for the Defendant *Olive Croucher*.

Mr. Simons, for the Defendant *H. C. Butler*, said that the 27th Eliz. c. 4. did not extend to Settlements

of personal Estate, and that therefore there was no ground for holding the Indenture of the 6th of August 1791 void as against the Plaintiff; and he cited *Sloane v. Cadogan* (a).

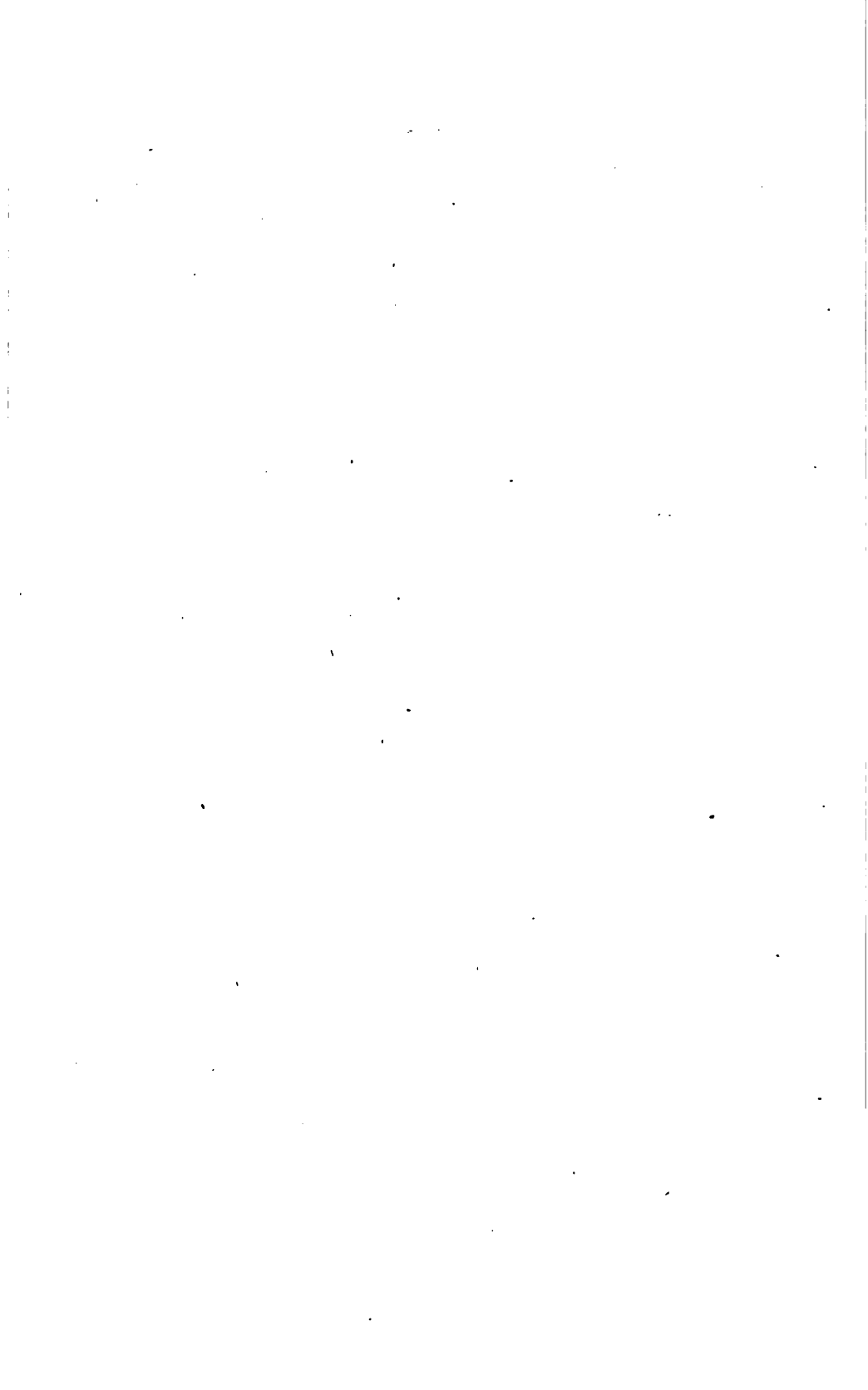
1822.
JONES
v.
CROUCHER
and others.

Mr. *Wilbraham*, for the Trustees.

The *Vice-Chancellor* said, that Settlements of personal Estate were not within 27th Eliz. c. 4, and that therefore the Plaintiff was not entitled to have the Money due to him raised by sale of any part of the Capital of the Bank Annuities; but that, as *Olive Croucher* had reserved to herself a life interest in the Stock, he would be entitled to be paid out of the Dividends of the moiety assigned to him, which should become due in her lifetime; and that, as against the Defendant, *H. C. Butler*, the Bill must be dismissed with Costs.

(a) Sugd. Veud. and Purch. 4th edit. 541.

END OF PART II.



CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

WAITE v. TEMPLE.

1823.
18th January.

Parties.

THIS was a Bill for the Administration of a Testator's Estate. The Testator gave one fifth share of the Residue of his Estate to *Thomas Parby*, or his Heirs, Executors and Administrators. *Thomas Parby* died in the life-time of the Testator. The Executors of *Thomas Parby* were made Parties to this Suit; but his next of Kin were not made Parties.

The Cause now came on to be heard.

Mr. *Stephenson*, for the Executors of *Thomas Parby*.

Mr. *Heald* objected that the next of Kin of *Thomas Parby* ought to be made Parties to this Suit; and said, the Court would refer it to the *Master* to inquire who were the next of Kin, with liberty to file a supplemental Bill to bring them before the Court.

Where the claim of the next of Kin is raised on the record, and one Person is, in that character, a Party, other Persons found by the Master to be next of Kin may be heard by the Court, though not Parties.

But where the claim is not raised on the Record, and none of the next of Kin are in that

character Parties to the Cause, there must be a supplemental Bill to bring them before the Court.

1823.

WAITE
v.
TEMPLE.

Mr. *Hart* said, that after the *Master's* Report the next of Kin might appear by Counsel, and that a supplemental Bill was unnecessary.

The VICE-CHANCELLOR:—

It appears to me that the next of Kin are entitled to be heard upon a claim as *personæ designatæ*; and the *Master* may inquire who are the next of Kin, with liberty to file a supplemental Bill to bring them before the Court.

It is contended, that after the *Master's* Report the next of Kin may be heard by Counsel without a supplemental Bill. If one of the next of Kin of *Thomas Parby* had in that character been made a Party to the Suit, and the claim of the next of Kin had been raised on the Record, then any other Persons found by the *Master* to be next of Kin might have been heard by Counsel, though not Parties; but where no one of the next of Kin is in that character a Party, nor the claim raised upon the Record, there must be a supplemental Bill.

Jugl. P. 98

WIGSELL v. SMITH.

1823.
18th & 19th Feb.

THIS was a Bill by a Widow, praying that she might be declared to be entitled to two several Rent-charges of 400*l.* charged, by way of Jointure, under two several Powers, created by different Settlements of the same Estate.

*Double Power.
Construction.*

Thomas Wigsell was in 1797 entitled to the *St. John* Estate, as Tenant for life in possession, under the Will of *Henry St. John*; and *Susannah Wigsell* was, under the same Will, entitled to a moiety of the same Estate in remainder, as Tenant in tail expectant on the failure of Issue of *Thomas Wigsell*. *Thomas Wigsell* was at the same time entitled as Tenant for life in possession to the *Wigsell* Estate, with Remainder to his first and other Sons in tail, with Remainder to *Susannah Wigsell* in tail, with Reversion to himself in Fee. By a Deed, dated the 28th of November 1797, and by a Recovery suffered by him and *Susannah Wigsell*, the Estates were settled to the old Uses, so far as respected the Life Estate to *Thomas Wigsell*, the Estate-tail to his first and other Sons, and the Estate-tail to *Susannah Wigsell*, with Remainder to Trustees for a term of 500 years, with Remainder to the Daughters of *Thomas Wigsell*, as Tenants in common in tail, with Cross-remainders, with Remainder to the use of *Atwood Wigsell Taylor* for Life, with Remainder to Trustees to preserve contingent Remainders, with Remainder

Settlement of two Estates in Remainder on *A. W. T.* for Life, with Remainder to his Sons in strict Settlement, and Remainder over to *M.* with power to Tenants for Life in possession to charge the Estates with a Jointure of 400*l.*; and Power to the Settlor to revoke the Uses of the Settlement as to one of the Estates, and to appoint new Uses. By a subsequent Deed the Settlor exercises the power of Revocation as to the Remainder to *M.*: in lieu thereof, appoints that Estate to *S.* and repeats several of the Powers

contained in the first Settlement, and gave Power to *A. W. T.* and *S.* to charge the Estate with 400*l.* by way of Jointure. *A. W. T.*, by separate Deeds, executes both Powers of jointuring.—Held, on a Bill by his Widow for both Jointures, that *A. W. T.* had no new Power to jointure under the second Settlement.

1823.

WIGSELL
T.
SMITH.

to the first and other Sons of *Atwood Wigsell Taylor* in tail male, with Remainder to his Daughters, as Tenants in common in tail, with Cross-remainders; with Remainder over to a Family of the name of *Mercer*. This Deed reserved a Power to *Thomas Wigsell* and *Susannah Wigsell*, jointly, or to the Survivor of them alone, to revoke the Uses thereby limited (except as to the Term of 500 years, and the Limitation to the Daughters of *Thomas Wigsell* in tail) "and to appoint any new or other Use "or Uses, Estate or Estates, Trusts, Powers, Provisos, "Limitations and Conditions, of or concerning the same "Premises, or any Part thereof." It also contained the usual Powers of leasing, and sale and exchange; and a Condition, that any person becoming entitled to these Estates, "under the Limitations aforesaid," should within six months afterwards assume the name and arms of *Wigsell*; and also a Covenant on the part of *Susannah Wigsell*, that she would not after the death of *Thomas Wigsell* exercise her Power of Revocation and Appointment, as to the *St. John* Estate, for any other purpose than that of selling, exchanging, or making partition. And it likewise contained a Power, authorizing every Tenant for life of the Estates under the Limitations in that Deed, to appoint, by Deed or Will, to the use of any Woman with whom he might intermarry, for her Life, as her Jointure, and in bar of Dower, any annual sum not exceeding 400 *l.* to be issuing out of and chargeable upon all or any part of those Estates, and also to charge the same to the extent of 2,000 *l.* with Portions for younger Children.

The joint Power of Revocation and new Appointment was never executed. In September 1805 *Thomas Wigsell* died without Issue, leaving *Susannah Wigsell* surviving.

By Deed-Poll, dated the 13th of November 1805, and duly executed by *Susannah Wigsell* pursuant to the Power, she revoked the Uses, Trusts, Estates, Powers, Provisions, Conditions, and Limitations of the *Wigsell* Estate, subsequent to the Limitation to the Daughters of *Attwood Wigsell Taylor*; and in pursuance of the Power contained in the Deed of 28th November 1797, appointed the *Wigsell* Estate, after failure of Issue of the Body of *Attwood Wigsell Taylor*, to the use of *R. T. Streatfield*, for Life, with Remainder to his first and other Sons in tail, with divers Remainders over. This Deed-Poll also contained a Power to *Attwood Wigsell Taylor*, and *R. T. Streatfield*, when entitled as Tenants for Life in Possession, "under the Limitations aforesaid," to charge the Estate with any annual sum not exceeding 400*l.* by way of Jointure to any Woman with whom he might intermarry, and with any sum not exceeding 3,000*l.* for the portions of younger children.

1823.
WIGSELL
v.
SMITH.

This Power to jointure was in the following words :

" Provided always, and the said *Susannah Wigsell* doth hereby further limit and appoint that it shall be lawful for each of them the said *Attwood Wigsell Taylor*, and *Richard Thomas Streatfield*, when entitled as Tenants for Life in Possession to the said Manors, Hereditaments, and Premises, under the Limitations aforesaid, either before or after his Intermarriage with any woman or women, from time to time and at any times, by any Deed or Deeds, Instrument or Instruments in writing, to be sealed and delivered in the presence of, &c. or by his last Will, &c. to grant, limit, or appoint, to or for the use of any woman or women with whom he shall intermarry or take to wife, for the Life or Lives of such woman or women, for her and their jointure and join-

1823.

WIGSELL
v.
SMITH.

tures, and in bar of her or their Dower, any annual sum or sums of Money, or yearly Rent-charge or Rent-charges, not exceeding in the whole the yearly sum of 400 *l.* to be tax-free, and without any deduction, and to be issuing out of, and chargeable upon, all or any part of the said Manors, Hereditaments, and Premises, with such Powers and Remedies for recovering such annual Sum or Sums, yearly Rent-charge or Rent-charges, when in arrears, and such term or terms of years for better securing the due payment thereof, as to the said *Attwood Wigsell Taylor*, and *Richard Thomas Streatfield*, shall seem proper; so that there never be more than the said yearly sum of 400 *l.* payable out of all or any of the Premises, as a jointure or jointures at one time."

In this Deed-Poll the Powers of Leasing, and the Condition to take the Names and Arms of *Wigsell*, were repeated in the same form as the Power to jointure.

On the 25th of December 1806, *Susannah Wigsell* died, and *Attwood Wigsell Taylor* thereupon became entitled to the Estates as Tenant for Life in Possession; and he assumed the Name and Arms of *Wigsell*, pursuant to the Condition. In 1814 he married; and by Indenture dated the 1st of November 1816, in execution of the Power reserved in the Deed of Nov. 1797, and of all other Powers enabling him in that behalf, he charged the Estates over which the Power extended with a jointure of 400 *l.* a year to his Wife, in bar of Dower, to commence on his Decease. By another Indenture of the 7th November 1816, reciting the Settlement of the 28th of November 1797, the Deed of Revocation and new Appointment of the 13th of November 1805, and the Power to jointure contained in the last-mentioned Deed, and that he was desirous of exercising this

second Power of jointuring in favour of his Wife, he, in pursuance of the second Power, charged the Estates over which it extended with a further jointure of 400 l. a year, in bar of Dower, and to commence on his Decease. In 1821 he died, leaving Issue by his Wife; and soon after his death his Widow filed this Bill against her eldest Son and the Trustees, praying that it might be declared that she was entitled to both these Jointures.

1823.

WIGSELL
v.
SMITH.

Mr. Preston, and Mr. S. Cullen, for the Plaintiff:—

The Question is: Whether the Power to Jointure contained in the Settlement of Nov. 1797, was revoked by the Deed of Revocation and new Appointment in Nov. 1805. If not revoked, it must be held that the Powers in each of these Deeds were co-existent, and being co-existent, that they were both duly executed, and that the Plaintiff is entitled to the two Jointures. It was decided in *Freke v. Lord Burrington* (a) that a Power cannot be constructively revoked, but must be expressly named, in order to make the revocation valid. But whether this Power was or was not revoked does not much affect the Case of the Plaintiff; for if there was not a double Power to Jointure over one of the estates, there must have been one Power over each of the two estates. In the Deed of November 1805, which extended only to the *Wigsell* Estate, *Attwood Wigsell Taylor* is expressly named in the Power to Jointure; and it is plain that there was an intention on the part of *Susannah Wigsell* to confer additional benefits on him and the other parties claiming under her Appointment. The fact, that the Power to raise Portions for younger Children, which, in the Deed of 1797 extends only to the sum of 2,000 l. is increased by the Deed of 1805 to

(a) 3 Bro. C. C. 274.

1823.

WIGSELL
v.
SMITH.

3,000 *l.* shows an intention to extend the Powers. The Claim of the Plaintiff, though not consistent with the probable intention of the Parties, is clearly consistent with the express terms of the Deed.

Mr. *Bickersteth*, for the Defendants:—

It is expressly provided, in the Powers of Jointuring, in each of the Deeds, that no more than one Jointure should be payable out of the Estate at one time. The sole object of the Deed of 1805 was to revoke the Uses limited in the Deed of 1797 to the Family of *Mercer*, and to substitute new Uses in favour of Mr. *Streatfield* and his family. It must be admitted that the Power to jointure in the Deed of 1805, extends to *Attwood Wigsell Taylor*, because he is expressly named in it. But as to him it was unnecessary, as he was then invested with a similar Power under the Deed of 1797. The Question is merely whether the Powers are cumulative; because it must be admitted that the Power in the Deed of 1797 was not revoked. The insertion of the Name of *Attwood Wigsell Taylor* in the Power in the Deed of 1805 was merely an unnecessary repetition, and conferred no new Power.

The VICE-CHANCELLOR:—

The argument of the Plaintiff supposes, that as to those Persons who continued to take under the first Settlement, the Conditions and Powers of the second Settlement were meant to be accumulative. The Condition to take the Arms and Name, the Power to Lease, the Powers of Sale and Exchange by the Trustees, could not in their nature be accumulative. No additional force was given to these Powers and Conditions by the second Settlement; and the Names of the Persons taking under the first Settlement could only be

there introduced into the second Settlement for the purpose of manifesting the intention of the Settlor, that these Conditions, Powers, and Provisoos, should equally affect all Persons who took by the first or second Settlement.

1823.

WIGSELL
v.
SMITH.

The inference is, therefore, that the Names of the Persons taking under the first Settlement were introduced into the Power of jointuring only for the purpose of manifesting the same intention of the Settlor. According to the language of this Power of jointuring in the second Settlement, it is to be exercised by *Attwood Wigsell Taylor*, when he should be in Possession under the second Settlement. But he took nothing by the second Settlement, and never could be in Possession under it; and the inaccuracy of this language strongly manifests that the Settlor had only one common intention, as applied to the objects of both Settlements.

Declare, therefore, that *Attwood Wigsell Taylor* had no Power of jointuring under the second Settlement.

“ This Court doth declare, that the Plaintiff *Juliana Wigsell* is entitled only to the Rent-charge, or sum of 400*l.* a year secured to her by the Indenture in the Pleadings mentioned, dated the 1st day of Nov. 1816; and doth order, that it be referred to Mr. *Courtenay*, one of the *Masters* of this Court, to take an account of what is due to the said Plaintiff *Juliana Wigsell*, in respect of her said Rent-charge or sum of 400*l.* a year. It is ordered, that what the said *Master*, on taking the said account, shall find due to the said Plaintiff *Juliana Wigsell*, be paid to her by the said Defendant *Richard*

1823.

WIGSELL

v.

SMITH.

Smith (the Trustee); and for better taking the said accounts, &c. And this Court doth not think fit to give any Costs on either side; and any of the Parties are to be at liberty to apply to this Court," &c.

Reg. Lib. B. 1822, fol. 604, b.

1823.

11th & 21st Feb.

9th April.

*Will.**Construction.*

FORD v. RAWLINS.

THE question in this Cause was, whether those Children of the Testator who died Infants took vested Interests under the following Clause in his Will:

Testator bequeathed to his Wife the use of his Furniture, &c. which he desired to be distributed among his Children when the youngest attained 21, at her and his Executors' discretion; such part to be reserved for her use as might be thought reasonable, and at her Death to be distributed as above directed.—Held, that those Children who died before the youngest attained 21, did not take vested interests.

"I further leave to the use of my said dear Wife, my furniture, plate, jewels, books and pictures, which I desire may be distributed amongst our Children on the youngest attaining twenty-one years, at her and my Executors' discretion; such part being nevertheless reserved for her use as may be thought convenient; and, at her death to be distributed as above directed."

The Testator left a Widow and six Children; three of whom died Infants, and the other three attained the age of twenty-one.

Mr. Horne, and *Mr. Combe*, for the Children who attained twenty-one:—

I. It is decided, that a Legacy to a particular class of persons, at a particular time, vests exclusively in those persons who constitute the class at the time fixed by the Will. *Godfrey v. Davis* (a). In the present Case

(a) 6 Ves. 43.

there was a direction to distribute certain Articles among a certain class of Persons, at a certain Time; therefore those who died before that time arrived must be held to take no Interest.

1823.
—
FORD
v.
RAWLINS.

II. This is not within that class of Cases where the Legacy is given to one for Life, with Remainder to the Children; and where it might therefore be considered that the Gift to the Children was postponed merely for the purpose of giving a Life Interest to the Wife. The Wife here takes a qualified Interest, determinable when the youngest Child attains twenty-one. *Batsford v. Kebbell* (b); *Hughes v. Hughes* (c); *Crone v. Oddell* (d).

III. The nature of the Property in this Case makes no difference.

Mr. *Bell*, and Mr. *Munro*, for the Representatives of the Children, who died before the youngest attained the age of twenty-one.

The Testator clearly intended to postpone, not the period of vesting, but merely the period of the enjoyment of the Property, thinking it the most beneficial arrangement for them, and fixing that period, until the arrival of which it was probable the Children would continue to reside with their Mother. He could not have any intention of deferring the vesting of the Gift to the Children with any view to their age. *Batsford v. Kebbell*, *Hughes v. Hughes*, and the other Cases cited on the other side, are Cases in which the Gift was in such express words as prevented the vesting till the period fixed for that purpose. It has been decided that a Legacy to a class of Children, though payable

(b) 3 Ves. 363. (c) 14 Ves. 256. (d) 1 B. & B. 449.

1823.

FORD
v.

RAWLINS.

at a future period, does not postpone the Vesting till that period. *Devisme v. Mello* (e), *Ellison v. Airey* (f), *Hanson v Graham* (g).

Mr. *Hayter*, for the Executors.

The VICE-CHANCELLOR:—

There is here no direct Gift to the Children, but a Power to the Widow and Executors to distribute amongst the Children, at their discretion, certain specific Articles when the youngest attains twenty-one. Of necessity, this means when the youngest who lives to twenty-one attains that age ; and the discretion which is given to the Widow and Executors must be meant to be applied to the circumstances of the Children at the period of division, and can have no relation to the Children who died in their infancy.

It makes no difference that the Widow is to have the interim use of this Property, or the use of a Part of it for her life, after the youngest Child does attain twenty-one, if she happens to be then living. Declare that the three Children who died under twenty-one did not take vested Interests.

(e) 1 Bro. C. C. 568.

(f) 1 Ves. sen. 111.

(g) 6 Ves. 239.

PRAED v. HULL.

1823.
12th & 19th Feb.

IN this Case the Bill was filed by Mortgagees against the Mortgagor, and also against a subsequent Mortgagee; and it prayed that the mortgaged Estate might be sold to satisfy the Claim of the Plaintiffs. The subsequent Mortgage contained a Power to sell the Estate.

*Practice.
Decree.*

Defendant submitting to the same Decree as the Plaintiff, according to the Case made by the Bill, would be entitled to at the hearing, may at any time stay all further proceedings in the Cause.

The Court was now moved on behalf of the Defendant, the Mortgagor, for a reference to the *Master*, to take an account of what was due to the Plaintiff, and the subsequent Mortgagee, for Principal and Interest, and Costs, and that upon Payment within six months after the Report they might re-convey; and that all Proceedings might be stayed in the mean time.

The Stat.
7 Geo. 2, c. 20,
asto Foreclosure,
gives no new
power to Courts
of Equity.

Mr. *Wakefield*, in support of the Motion, insisted that the Mortgagor was entitled to such an Order in this Case as in the common Case of Foreclosure.

Mr. *Horne*, for the Plaintiff, refused to consent to the Motion, and insisted that such an Order could not be made without his Consent.

The VICE-CHANCELLOR :—

The Act 7 Geo. 2, c. 20, gives authority to Courts of Equity, in a Suit for Foreclosure, to stay the Proceedings in any stage of the Cause, upon the Defendant submitting to the same Decree, as the Plaintiff would, according to the Case made by the Bill, be entitled to at the hearing of the Cause. It has frequently been stated by Judges of the highest authority that Courts of

1823.

PRAED

v.

HULL.

The Stat.

7 Geo. 2, c. 20,
gave no new
jurisdiction to
Courts of Equity.

Equity did not require the aid of the Legislature in that respect, and that the real purpose of the Statute was to give a new Jurisdiction in the case of Mortgages to Courts of Law, and that the section as to Courts of Equity, was merely incidental and unnecessary. The present Bill being for Sale, and not for Foreclosure of the mortgaged Estate, is not within the Statute; but I fully adopt the opinion of the former Judges, to whom I refer, and consider that Courts of Equity have inherent Jurisdiction to stay the Proceedings in any Cause, and in any stage of the Cause, whenever the Defendant will at once submit to a Decree establishing the full Demand made by the Bill, and the whole Relief prayed in respect of that Demand, with Costs.

The present Motion is, however, misconceived. It submits, indeed, to the whole demand made by the Plaintiffs, but not to the whole relief prayed by the Bill. In the first place, it requires that all proceedings on the part of the Plaintiffs should be stayed until the Accounts of the Defendants are taken, with which the Plaintiffs have no concern; and then it provides no remedy if the Mortgagor should happen not to pay the Money reported due at the end of the six months; and the Plaintiffs may then have to re-commence their proceedings. The Plaintiffs are not to be prejudiced by such an Interlocutory Order. If the Defendant, the Mortgagor, and his Co-defendants, the subsequent Mortgagees, will now submit to the same decree as the Plaintiffs, according to the Case made by the Bill and the Decree prayed, would be entitled to at the hearing, with Costs, I am fully prepared to make such an Order, and I can now make no other Order.

IRVINE v. YOUNG.

1823.
25th February.

Account.

THIS was a Bill by the Assignees of a Bankrupt against his Co-partner in an Adventure Account. The Bill stated that three years before the Bankruptcy the Defendant had delivered an Account to the Bankrupt; but the Bill treated the whole matter as still unsettled.

The mere fact of the Delivery of an Account, without Evidence of Acquiescence, does not afford sufficient legal presumption of Settlement.

The Defendant, by his Answer, stated, that the Account referred to by the Bill had never been objected to before the Bankruptcy; and he insisted that it was therefore to be taken as a settled Account. But he gave no Evidence as to what followed the delivery of the Account; nor did it in any manner appear in the Cause, other than by the Allegations in the Answer.

Mr. *Hart*, and Mr. *Matthews*, for the Plaintiff.

Mr. *Bell*, and Mr. *Collinson*, for the Defendant, insisted, that as the Plaintiff had not disproved the Allegation in the Answer, the Court must consider the Account as settled.

The VICE-CHANCELLOR:—

It was as incumbent upon the Defendant to support his Answer by Evidence, as it would have been to support by Evidence a Plea of a settled Account. The naked fact of Delivery, without Evidence of contemporaneous or subsequent conduct, affords no sufficient legal presumption that the Account was settled.

1823.
28th February.

Practice.

The principle of Waiver applies to an irregular, but not to an erroneous, Order.

LEVI v. WARD.

THE Bill was filed on the 16th of January 1823. On the 17th of January the Plaintiff obtained, upon an Affidavit, stated to be an Affidavit of Merits, the Order, that Service of the Subpœna upon the Attorney at Law should be good Service, the Defendant being abroad.

The Subpœna was served on the 22d of January; on the 27th the Attorney entered an Appearance for the Defendant. On the 9th of February the Plaintiff sued out an Attachment for want of an Answer; and on the 10th of February obtained the common Injunction to stay Proceedings at Law.

On the 15th of February Notice was given of a Motion, on the part of the Defendant, to discharge the Order for the Service of the Subpœna on the Attorney at Law, and all subsequent Proceedings, on the ground that there was no sufficient Affidavit of Merits to justify that Order.

The insufficiency of the Affidavit was not denied; but Mr. *Parker*, for the Plaintiffs, insisted, that the Defendant came too late, inasmuch as the insufficiency of the Affidavit was apparent on the Order when the Subpœna was served on the 22d of January; and that by his appearance and subsequent delay he had led the Plaintiff to the Expenses of the Attachment and the Injunction. *Downes v. Witherington (a), Fletcher v. Wells (b).*

(a) 2 Taunt. 242.

(b) 6 Taunt. 91.

Mr. *Heald*, for the Defendant.

1823.

The VICE-CHANCELLOR:—

LEVI
v.
WARD.

If this had been a question of Irregularity, I should have been of opinion that the Defendant, by his subsequent conduct, had waved the Irregularity; but it is, strictly, not an irregular but an erroneous Order, and the principle of Waver cannot save it.

Order made without Costs.

SIDDEN v. FORSTER.

1823.
10th March

Practice.

THE Defendant had put in his Examination to the usual Interrogatories in the *Master's* Office, as to the Sums received by him on account of certain Real Estates, of which he was a Trustee. Afterwards the Plaintiff discovered that the Defendant had received various Sums which were not mentioned in the Examination; upon which he carried in a special state of Facts as to the matters so discovered, and exhibited fresh Interrogatories for the Examination of the Defendant relative thereto; but the *Master* refused to receive these Interrogatories, conceiving he had no authority so to do without an Order of the Court to that effect.

If after a Defendant has put in his Examination to the usual Interrogatories before the *Master*, the Plaintiff discovers that the Defendant has received Sums not mentioned in his Examination, the *Master* is at liberty to receive a new state of Facts, and further Interrogatories founded upon them, without the Order of the Court.

Mr. *Bell*, for the Plaintiff, now moved, that the *Master* might be ordered to receive the new Interrogatories. He said it was the practice of the *Masters* to receive Interrogatories from time to time; and that,

1823.

SIDDEN
v.
FORSTER.

after a Defendant had been examined upon the usual Interrogatories, the Plaintiff was at liberty to carry in a special state of Facts, and to exhibit Interrogatories for the Examination of the Defendant as to its contents.

Mr. Wyatt, *contra*:—

If Interrogatories are allowed to be exhibited from time to time the Defendant will be put to great trouble and expense. There must be some limit to the indulgence thus given to the Plaintiff.

The *Vice-Chancellor* considered that the Order of the Court was not necessary to enable the *Master* to receive these Interrogatories; and that he had full authority, under the general direction in the Decree, to examine a Party from time to time, as the justice of the case should require.

S. C. 3 Rep. 304-

HOPKINS v. TOWLE.

HANNAH Lambe by her Will devised to *J. Fullagar* and *Thomas Towle*, and their Heirs, a freehold Messuage at *Walthamstow* in *Essex*, upon Trust to pay the Rents and Profits to her Daughter *Hannah Killingsley*, the Wife of *Robert H. Killingsley*, during the joint Lives of her and her Husband, for her separate use ; but in case she should survive her Husband, then in Trust to permit her to receive the Rents and Profits for her natural Life ; and, after her decease, the Testatrix gave the Messuage unto the Children which her Daughter should have living at the time of her decease, equally to be divided between them, share and share alike, as Tenants in common, and to the several and respective Heirs of their bodies ; and in default of all such Issue, then she gave the same unto her Daughter *Mary Cooper*, the Wife of *R. H. Cooper*, and to the Heirs of her body ; and, in default of all such Issue, then she gave the same to her own right Heirs : also she gave to her Daughter, *Mary Cooper*, 1,000*l.* to be paid to her within three months next after the Testatrix's decease, to make her equal with *H. Killingsley* for the House at *Walthamstow* ; and she gave to *R. H. Cooper* 500*l.* ; also she gave to *Mary Cooper* her freehold Messuage at *Brentwood*, to hold the same to her and the Heirs of her body ; and in default of such Issue she gave the same to *Fullagar* and *Towle*, and their Heirs, upon Trust to receive the Rents and Profits thereof, and to pay the same to *Hannah Killingsley*, during the joint Lives of her and her Hus-

1823.
11th March, and
17th April.

Will.
Construction.

Testatrix bequeathed one moiety of the Residue of her Personal Estate to her Daughter *Hannah*, for her separate use, during the joint lives of her and her Husband ; and, if she survived, to her absolutely ; if not, to her Children who should attain 21 ; and she bequeathed the other moiety for the benefit of her Daughter *Mary* and her Children ; with a Bequest over, if she died without Children, to *Hannah* and her Children, in like manner as the first moiety. By a Codicil, she bequeathed the whole Residue, if both her Daughters died

without leaving a Child who should attain 21, to *A.* Both the Daughters died without Issue, but *Hannah* survived her Husband : held, nevertheless, that *A.* was entitled to the Residue.

1823.

HOPKINS

v.

TOWLE.

Residue

band, for her separate use; but in case *H. Killingsley* should survive her Husband, then in Trust to permit her to receive the Rents and Profits for her natural Life, and, after her decease, she gave the last-mentioned Messuage unto the Children which *H. Killingsley* should have living at her decease, equally to be divided between them as Tenants in common, and to the several and respective Heirs of their bodies; and, in default of such Issue, the Testatrix gave the same to her own right Heirs. And she gave to her said two Daughters all her Plate, Household Goods, China, Linen, wearing Apparel and Furniture, to be equally divided between them. And she gave to *Fullagar* and *Towle* thirty Guineas a-piece for their trouble, and also 50*l.* to be distributed by them amongst poor dissenting Ministers' Widows. All the Rest, Residue, and Remainder of her Estate whatsoever and wheresoever, subject to the payment of all just Debts, Legacies and Funeral Expenses, she gave to *Fullagar* and *Towle*, their Executors and Administrators, upon Trust, to place out or continue the same at Interest, upon Government or real Securities, and to pay the Dividends, Interest and Produce of one moiety thereof, to *Hannah Killingsley*, during the joint Lives of her and her Husband, for her separate use; and in case she should survive her Husband, then upon Trust, to stand possessed of one moiety of the Residue for the use and benefit of her Daughter *Hannah*; but in case she should not happen to survive her Husband, then, immediately after her decease, in Trust, to pay that moiety unto her Children, and to such one or more of them as she should by her Will appoint; and in default of such Appointment unto all her Children living at her decease, equally to be divided between them, and to be paid to them as they severally attained the age of twenty-one years: Provided, that if *Hannah*

should not have any Child living at her decease, or having a Child or Children then living, such Child, or all such Children, should die under the age of twenty-one years, then in Trust, to stand possessed of that moiety to and for the use and benefit of her other Daughter *Mary Cooper*, and her Child or Children, in the same manner as was thereafter directed touching the other moiety of her Estate. And as to the other moiety of her Estate so to be placed out and continued at interest, upon Trust, that *Fullagar* and *Towle* should pay the Interest, Dividends and Produce thereof, to *Mary Cooper*, during the joint Lives of her and her Husband, for her separate use; and, after her decease, then in Trust to pay and apply the last-mentioned moiety unto her Child or Children, or to such one or more of them as she should by Will appoint, and in default of Appointment, unto and amongst all her Children living at her decease, in the same manner as was thereinbefore declared concerning the first moiety: Provided, that if *Mary Cooper* should not have any Child living at her decease, or having a Child or Children then living, such Child, or all such Children, should die under the age of twenty-one years, then in Trust, to stand possessed of the last-mentioned moiety for the use and benefit of *Hannah Killingsley*, and her Child and Children, in the same manner as was thereinbefore directed touching the first-mentioned moiety of the Residue of her Estate; provided, that in case *H. Killingsley* should die in the life-time of her Husband, and should not have any Child living at her death, or leaving a Child or Children then living, such Child, or all such Children, should die under the age of twenty-one years, then in Trust, to stand possessed of the second-mentioned moiety, for the Executors or Administrators of *Hannah Killingsley*; provided, that in case *Mary*

1823.

HOPKINS
v.
TOWLE.

1823.

HOPKINS

v.

TOWLE.

Cooper should not have any Child living at her death, or having a Child or Children then living, such Child, or all such Children, should die under the age of twenty-one years, then she directed *Fullagar* and *Towle* to stand possessed of the moiety of the Residue of her Estate so as aforesaid given over to *Mary Cooper* and her Children, upon the event of her Sister dying in the life-time of her Husband, and leaving no Child, or of her Child or Children dying under twenty-one, in Trust for the Executors or Administrators of *Mary Cooper*. And she appointed *Fullagar* and *Towle* Executors of her Will.

The Testatrix, by a Codicil, revoked the devise in her Will of the Messuage at *Walthamstow* after the decease of her Daughter *Hannah Killingsley* without Issue, unto her Daughter *Mary Cooper*, and the Heirs of her body; and she also revoked the Devise thereof to her own right Heirs; and she thereby gave, after the decease of *Hannah Killingsley* without Issue, that Messuage to the Trustees, upon Trust, to pay the Rents and Profits thereof to *Mary Cooper* for her separate use, during the joint Lives of herself and her Husband; but in case she should survive her Husband, then in Trust, to permit her to receive the Rents and Profits thereof for her Life. And after her decease the Testatrix gave that Messuage to her Children living at her decease, as Tenants in Common in Tail, with Remainder to all the Children of her two late Brothers, *S. Steare*, and *William Steare*, who should be then living, as Tenants in common in Fee. And the Testatrix also revoked the Bequests of 1,000*l.* to *Mary Cooper*, and of 500*l.* to *R. H. Cooper*; and, in lieu thereof, she gave to the Trustees 1,500*l.* upon Trust, within three months after her decease, to place it out at Interest in the Funds,

1823.

HOPKINS
v.
TOWLE.

and to pay the Dividends thereof to *Mary Cooper* during the joint Lives of her and her Husband, in such and the like manner as one moiety or half part of her Estate was by her Will directed to be placed out at Interest for the separate use of *Mary Cooper* and her Children, in such manner as was in her Will for that purpose mentioned. And in case *Mary Cooper* should not have any Child or Children living at her decease, or having a Child or Children then living, they should all die under the age of twenty-one years, then she directed the Trustees to stand possessed of the 1,500*l.* in Trust for *Hannah Killingsley*, and her Child and Children, in the same manner as in her Will was directed touching the first-mentioned moiety of the Residue of her Estate therein given and bequeathed to the Trustees for the separate use of *Hannah Killingsley*, and her Children: *But in case both her Daughters should die without leaving any Child or Children living at the time of their respective deaths, or having such they should all die under the age of twenty-one years*, then she directed the Trustees to stand possessed of the 1,500*l.* together with all the Residue of her Personal Estate by her Will given to them in Trust for the separate use of her two Daughters and their Children, as therein is mentioned, in Trust for all the Children of her two Brothers, *S. Steare*, and *William Steare*, as should be then living, equally to be divided between them, Share and Share alike. And the Testatrix also revoked the Devise of the Messuage at *Brentwood* to *Mary Cooper*, and to the Heirs of her Body. And in default of such Issue of *Hannah Killingsley*, she likewise revoked the Devise thereof to her own right Heirs; and she thereby gave that Messuage to the Trustees, upon Trust, to pay the Rents and Profits thereof to *Mary Cooper*, for her separate use, during the joint Lives of her and her Husband.

1823.

HOPKINS
v.
TOWLE.

But in case she survived her Husband, then in Trust, to permit her to receive the Rents and Profits thereof for her Life; and after her decease, she gave that Mesuage to the Children of *Mary Cooper* living at her decease, as Tenants in common in Tail, with Remainder to the Trustees in Fee, in Trust, for the proper use of *Hannah Killingsley*, and her Issue, in the like manner as the same was given to her and them by the Will. And in default of such Issue, then she gave the same unto the Children of her Brothers, *S. Steare*, and *William Steare*, as should be then living, as Tenants in common in Fee.

Mrs. Cooper died without Issue, in *Mrs. Killingsley's* life-time; the latter survived her Husband, and also died without Issue. The Plaintiffs were the only Children of *S. Steare*, and *William Steare*.

They insisted, by their Bill, that, in the events that had happened, the Funds in which the Testatrix's Residuary Estate was invested had come to, and did then of right belong to, the Plaintiffs; and they prayed, that it might be declared that they were entitled, upon the true construction of the Will and Codicil, to those Funds in equal moieties; and that the Trustees might be decreed to transfer the same accordingly, and to account for and pay to the Plaintiffs the Dividends arisen thereon since *Mrs. Killingsley's* death.

The Defendants, who were Legatees of certain parts of the Funds under *Mrs. Killingsley's* Will, by their Answer, submitted to the Court whether, according to the true construction of *Mrs. Lambe's* Will and Codicil, *Mrs. Killingsley* having survived her Husband, and *Mrs. Cooper* having died without Issue, *Mrs. Killingsley*

did not become absolutely entitled to the Funds ; and whether the same, together with all the Dividends accrued thereon since Mrs. *Killingsley's* death, ought not to be transferred and applied pursuant to her Will.

1823.

HOPKINS
v.
TOWLE.

Mr. *Sugden*, and Mr. *Pepys*, for the Plaintiffs :—

By the Will, one moiety of the Residue is given to *Hannah Killingsley* absolutely, in case she survives her Husband ; and the question is, whether the Codicil cuts down that absolute Bequest, and gives to the Plaintiffs the whole Residue, in the event of the Testatrix's two Daughters dying without having any Child who should attain the age of twenty-one years, whether *Hannah* did or did not survive her Husband ? The Will is not accurate ; because it gives one moiety to Mrs. *Cooper* during the joint Lives of her and her Husband only, and then gives it over on Mrs. *Cooper's* decease. The words of the Codicil upon which this question arises are, " but in case both my said Daughters shall happen to die without having any Child or Children living at the time of their respective deaths, or having such, they shall all happen to die under the age of twenty-one years, then I do hereby order and direct," &c. Now, though there is no express revocation of the gift of a moiety to each Daughter absolutely, yet the effect of this clause is to revoke those Bequests. *Doran v. Ross* (a).

Mr. *Bell*, and Mr. *Horne*, for the Defendants :—

The construction of the Codicil is very easy, if we get at the true construction of the Will. The Proviso which follows the bequest of the first moiety of the Residue appears, *primâ facie*, to relate to the whole of that Bequest.

(a) 1 Ves. 57.

1823.

HOPKINS

v.

TOWLE.

But, upon further consideration, it will be found to relate only to the event of Mrs. *Killingsley* surviving her Husband. The Testatrix, throughout the whole of this Will, contemplates two events, one of which is *Hannah's* dying in the life-time of her Husband, and the other of her surviving him; and if she survives, she always contemplates her taking absolutely. When the Testatrix, in her Codicil, directs, that, in case Mrs. *Cooper* should die without leaving any Child who should attain twenty-one, her Trustees should stand possessed of the 1,500*l.* in Trust for Mrs. *Killingsley* and her Children, in the same manner as in her Will was directed touching the first-mentioned moiety of the Residue of her Estate; it is exactly the same as if she had repeated the words; and therefore as if she had said: "If *Mary* dies without Issue, I give the 1,500*l.* to the separate use of *Hannah*; and if she dies in the life-time of her Husband, then to her Children, as she shall appoint; and if she survive her Husband, then to her absolutely." Then comes the Clause upon which the difficulty arises. Now in that Clause there is no Revocation of what the Testatrix had before given to *Hannah*, which clearly shows that she was not contemplating a general failure of Issue, but that failure of Issue upon which she gave over the Property she had bequeathed to *Hannah*; that is, her dying without Issue in the life-time of her Husband.

THE VICE-CHANCELLOR:—

The words of the Codicil, taken literally, do, in the event which has happened, of both Daughters having died without Children, make a complete disposition of the 1,500*l.* Legacy, and of the whole Residuary Estate, in favour of the Plaintiffs.

It is, however, insisted, on the part of the Defendants, that as *Hannah Killingsley* survived her Husband, and would, therefore, if there had been no Codicil, have taken the whole Residuary Estate absolutely, whether she had Children or not, the Codicil is not to be understood as referring to that event, but as referring only to the event in which the Will had made a Disposition over of the whole Residuary Estate, in the event of there being no Child of either Daughter, namely, in the case of *Hannah* dying in the life-time of her Husband; and that all which the Codicil intended was a substitution for that gift.

I have entertained great doubt upon this point; but, upon the whole, I think I should disappoint the intention of this Testatrix, if I were so to qualify the general sense of the expressions which she has used. There are parts of the Codicil which were not observed upon at the Bar, which appear to me to afford Evidence of the general intentions of this Testatrix.

The Testatrix was seised of a Freehold Property at *Walthamstow*, and of another Freehold Property at *Brentwood*; and both are so devised by the Will, that in the event of *Hannah Killingsley* having no Children, *Mary Cooper* would take the absolute Interest in Tail, with a Remainder to the two Daughters in Fee. The Testatrix also, by her Will, gives 1,000*l.* absolutely to *Mary Cooper*, and 500*l.* absolutely to her Husband. All the rest of the Testatrix's Property, with the exception of very trifling Legacies, passes by the Residuary Gift to the two Daughters and their Children. The Will takes no notice of the Children of the Testatrix's two Brothers, the *Steares*. By the Codicil, the Devises of the two Freehold Properties at *Walthamstow*, and at *Brentwood*,

1822.

 HOPKINS
v.
TOWLE.

1823.

HOPKINS
v.
TOWLE.

are revoked, and new Devises are made, providing for the Daughters and their Children; but, on failure of their Children, limiting these Properties to the Family of the *Steares*. The absolute Gift of the 1,000*l.* to *Mary Cooper*, and of 500*l.* to her Husband, are in like manner revoked; and the Clause of the Codicil upon which the question arises limits a Life Interest in these two sums to *Mary Cooper*, with Remainder to her Children, with Remainder to her Sister *Hannah Killingsley* and her Children, with Remainder over, in case of the failure of the Children of both Daughters, to the Family of the *Steares*, by the expressions which create the doubt. These expressions refer to, and, in the event of the failure of the Children of the Daughters, comprise also, the whole Residuary Estate.

The purpose of the Codicil therefore seems to be, in case of the failure of the Daughters and their Children, to take away the absolute Interests which, by the Will, would have vested in the Daughters, and to substitute the *Steares* as the general objects of her bounty. And if I were to venture to qualify the literal force of the expressions in the Codicil, so as to prevent their having that effect as applied to the 1,500*l.* and the Residuary Estate, I fear that I should not advance, but disappoint, the intention of the Testatrix.

Declare that, according to the true construction of the Will and Codicil of *Hannah Lambe*, the Testatrix in the Pleadings named, the Plaintiffs are entitled, in equal moieties, to the sums of Bank Annuities in the Pleadings mentioned to be standing in the Names of the Trustees of her Will.

Decree affirmed 3 Ruf. 311.

PRICE v. COPNER.

THE Bill was filed for the Redemption of Lands in *Herefordshire*, which had been mortgaged by the Plaintiff's Ancestors. The question in the Cause was: "Whether the Equity of Redemption was barred by length of time."

In 1761 *Martin Hall*, being seised in Fee of the Estate in question, mortgaged it to *William Hall*, for a term of one thousand years, to secure 50*l.* and Interest. In 1766, one *Powell* paid off the 50*l.* and took an Assignment of the Mortgage.

By Indentures of Lease and Release, dated the 19th and 20th of January 1768, and made between *Martin Hall*, of the first part; *William Price*, and *Elizabeth* his Wife, of the second part; *Henry Cotmore*, of the third part; and *Walter Ingram*, of the fourth part; *Martin Hall*, in consideration of his natural love and affection for *Elizabeth Price*, his Daughter, and for the purposes after mentioned, conveyed the Lands to *Cotmore* and *Ingram*, to hold to *Cotmore* for sixty years; and after the expiration of that Term, to the use of *Ingram* in Fee, in Trust for *Price* and his Wife, and their Heirs, subject to the payment of the Money due to *Powell*. The Trusts of the term of sixty years were to permit *Martin Hall* to take the Rents for so many years of that Term as he should live, and then to stand possessed of it for *Price* and his Wife, their Heirs and Assigns, and to

out a Fine, to the Mortgagee. The Wife survives; she or her Heir may redeem at any time within 20 years from the Husband's death.

1823.
25th March, and
17th April.

*Equity of
Redemption.*

Where the Purchaser of an Equity of Redemption had the legal Estate conveyed to him by a Deed, dated the 24th of Aug. 1796, in which it was recited, that the Purchaser had some time since paid to the Mortgagee the Money due on his Mortgage, and a Bill to redeem was filed on the 29th of January 1816: held, that the Recital was an acknowledgment of the Mortgage Title, within 20 years from the filing of the Bill.

Husband and Wife being jointly entitled to an Equity of Redemption in Fee, convey it by Deed, with-

1823.

PRICE

v.

COPNER.

attend the Inheritance. *Martin Hall* covenanted that the Lands were free from Incumbrances, except the Mortgage.

By Indentures of Lease and Release, dated the 31st January, and 1st of February 1768, the Release being made between *Price* and his Wife of the first part; *Ingram* of the second part; *Coningsby Brace* of the third part; and one *Bernard* of the fourth part; and by a fine levied by *Price* and his Wife, they, in consideration of 30*l.* to them paid by *Brace*, conveyed the Lands to *Brace* in Fee, subject to a proviso, that *Brace* and his Heirs should, on re-payment of that Sum, with Interest, on the 1st of February 1769, re-convey the Lands to *Price* and his Wife, their Heirs and Assigns, or to such person or persons, uses or purposes, as they should appoint, or should stand seised thereof for the use of *Price* and his Wife, their Heirs and Assigns.

By an Indenture, dated the 18th of October 1768, made between *Hall* of the first part; *Cotmore* of the second part; *Brace* of the third part; *Price* and his Wife of the fourth part; and *John Hughes* of the fifth part, *Cotmore*, by *Hall's* direction, assigned the Lands to *Hughes* for the remainder of the term of sixty years; and *Brace*, on being paid his Principal and Interest, conveyed to *Hughes* in Fee, subject to a Proviso, that on payment of 21 *l.* by *Hall* or *Cotmore*, or their Representatives, to *Hughes*, or his Executors, on the 16th of October then next, the latter should re-assign the term of sixty years, or stand possessed thereof upon the Trusts of the Indenture of the 20th of January 1768; and that if *Price*, or his Heirs, should pay to *Hughes*, on the same day, the Money paid to *Brace*, then *Hughes* should stand seised of the Lands to the use of *Price* and

his Wife after *Hall's* Decease, and for the other purposes expressed in the Indenture of the 20th of January 1768.

1823.

PRICE
v.
COPNER.

By an Indenture, dated the 17th of October 1768, and made between *Powell* of the first part; *Hall*, and *Price* and his Wife, of the second part; and *Hughes* of the third part; *Powell* and *Hall*, in consideration of the Money due to the former being paid to him by *Hughes*, assigned the Lands to *Hughes* for the remainder of the term of one thousand years, subject to redemption, on payment by *Hall*, his Heirs, Executors, and Administrators, to *Hughes*, or his Executors, of the Principal and Interest on the 16th of October then next.

By an Indenture, dated the 3d March 1769, and made between *Hall*, and *Price* and his Wife, of the one part, and *Hughes* of the other part, in consideration of the Sums then due to *Hughes* from *Hall* and *Price*, and of a further Sum then advanced by *Hughes* to *Price* and his Wife, making in all 162*l.* *Hall*, and *Price* and his Wife, released, assigned, and confirmed the Lands to *Hughes*, his Heirs, Executors, Administrators, and Assigns, not only for the term of one thousand years, but, after the expiration of it, for ever; subject to a proviso for Redemption on payment by *Hall* and *Price*, or either of them, or their Heirs, to *Hughes*, his Executors, &c. of the 162*l.* and Interest, on the 2d March then following; and that after such payment, *Hughes* and his Heirs should stand seised of the Lands in Trust for *Hall*, for so many years of the Term as he should live; and after his Decease, in Trust for *Price* and his Wife, and their Heirs, and, at their request, to re-convey the Lands, according to the Uses and Trusts of the Indenture of the 20th of January 1768.

1823.

PRICE
v.
COPNER.

By Indentures of Lease and Release, dated the 5th and 6th of April 1774, the Release being made by *Hall*, and *Price* and his Wife, of the one part, and *James Stephens* of the other part, in consideration of 15*l.* paid by *Stephens* to *Hall* and *Price*, they, together with *Elizabeth Price*, conveyed their equity of Redemption to *Stephens* in Fee. These Indentures were executed by *Price* and his Wife only.

James Stephens afterwards died, having devised all his Real Estates to *Henry Stephens* in Fee, and appointed him his Executor.

By Indentures of Lease and Release, dated the 23d and 24th of August 1796, the Release made between *Hughes*, of the first part, *Henry Stephens* of the second part, and *Thomas Copner* of the third part, after reciting the Indenture of the 3d March 1769, and that *Henry Stephens* had some time since paid *Hughes* the Principal and Interest due on his Mortgage, *Hughes*, by the direction of *Henry Stephens*; and *Henry Stephens*, in consideration of 305*l.* paid to him by *Copner*, conveyed the Lands to *Copner* in Fee.

William Price died in April 1797, and *Elizabeth Price* in May 1803, leaving the Plaintiff her Heir at Law. *Thomas Copner* died in 1812, leaving the Defendant, *Priscilla Copner*, his Widow and Administratrix, and the other Defendant, *Thomas Copner*, his Heir at Law. *Hughes* had never been in possession of the Estate. But *Price* remained in possession until some time in August 1796, when *Thomas Copner* forcibly ejected him.

The Bill was filed on the 29th January 1816. By the Decree made on the hearing of the Cause, it was

1823.

PRICE
v.
COPNER.

referred to the *Master* to inquire whether the Defendants, or those under whom they claimed, had treated the Premises in question as a Mortgage Title, or in any manner acknowledged them to have been held as a Mortgage Title at any time within twenty years before the filing of the Bill. The *Master* having reported in the affirmative, the Defendants took Exceptions to his Report, and the Cause now came on to be heard upon those Exceptions, and for further directions.

Mr. *Bell*, and Mr. *Roupell*, for the Plaintiff:—

We contend that the Assignment by *Hughes* to *Copner* was an acknowledgment of the Mortgage Title; and if not, that the right of Redemption is not barred; because during *Price's* Life the Estate was irredeemable. By the Conveyance of April 1774, *James Stephens* got an Estate during the Life of *William Price* completely absolute. For though *Price* could not deprive his Wife of her Reversion, yet he could pass the Interest during his own Life. The consequence was that his Wife never could have a right of Entry until her Husband's death.

This is not the case of a married Woman being divested of her right to an Estate, and who has only ten years after the death of her Husband to assert her right. But here *Copner* got a perfect Estate during the Life of *Price*, and would have had the power of disposing of it if *Price* had survived his Wife. When this Bill was filed it would have been competent for the Plaintiff, if there had been no outstanding Term, to assert his right by bringing an Ejectment. Suppose *Henry Stephens*, or *Copner*, who represents him, had entered into possession of the Premises in 1796, then Mrs. *Price* would have

1823.

PRICE
v.
COPNER.

had a right, upon her Husband's death, to bring a Bill to redeem *Hughes's* Mortgage. Supposing that *Price* and his Wife did convey the Fee Simple to *Stephens* in 1774; if no Mortgage had been then existing *Mrs. Price* would have had twenty years after the death of her Husband in 1797 to bring an Ejectment. For her Husband had given a good Title during his Life; and if it had not been for *Hughes's* Mortgage it would have been competent for her Son, in 1816, to have brought an Ejectment. It never can be held, that, if the Tenant for Life of a mortgaged Estate lives for twenty years after the Mortgagee has been in possession, the Remainderman will be barred of his right to redeem. As soon as a person who has got a legal Title gets in a Mortgage he is considered as receiving the Rents in discharge of the Mortgage. If *Hughes* had taken a Conveyance from *Price* he would have had a right to hold the Estate, and might have set *Mrs. Price* at defiance during *Price's* Life. She could not have compelled him to part with the legal Estate until her Husband's death. In this Case a Life Interest was obtained from one person, and a Mortgage upon the same Estate from another, during the Coverture: was not, then, *Mrs. Price* entitled to redeem when her Coverture determined? If a Tenant for Life takes in a Mortgage, can he, when his qualified Interest ceases, say that he is entitled absolutely to the Estate?

Mr. Sugden, and Mr. Knight, for the Defendants:—

I. That which is relied upon by the Plaintiff as an acknowledgment of the Mortgage Title is not such an acknowledgment as a Court of Equity requires. To say that the getting in of the legal Estate is an acknowledgment of the Mortgage Title, is to violate the usual

1823.

PRICE
v.
COPNER.

sense of words. It does not appear that the Money due on the Mortgage was paid off within the twenty years; for the recitals of the Deed of 1796 state that *Henry Stephens* had *some time since* paid off the Principal and Interest due to *Hughes*. If the Mortgage Money was paid off a very few months only before the date of that Deed, we should stand on a Title where the Mortgage Money was paid off more than twenty years before the filing of the Bill.

II. Here the Parties who seek to redeem claim adversely the Equity of Redemption; and the mere acknowledgment of a Mortgage is not sufficient to give a right of Redemption where the persons who claim subject to the Mortgage Title claim adversely the Equity of Redemption.

III. *Mrs. Price* says, that because she and her Husband were jointly seised of this Estate, twenty years must elapse after her Husband's decease, before she is barred of her right to redeem. From what was said in *Blake v. Forster* (a), and in the second branch of the Case of the *Marquis of Cholmondeley v. Earl of Clinton* (b), there can be no Equity of Redemption after twenty years, let the Estate be settled as it may. It is impossible to treat *Mr. Price* as Tenant for Life, or *Mrs. Price* as entitled to an Estate of Inheritance in Remainder; for the Equity of Redemption was settled on them in Entirety. It cannot be represented as constituted of different Estates: it is one entire Fee Simple; and therefore the right to redeem must be entire. *Mrs. Price* and her Husband had the right; then why should she

(a) In the House of Lords, sess. 1823, not yet reported.

(b) 2 J. & W. 1.

1823.

PRICE
v.
COPNER.

not exercise it? She might have filed a Bill to redeem. *Harrison v. Hollins* (c).

IV. Supposing, however, that a right to redeem did exist in Mrs. Price at her Husband's decease, by what rule is she entitled to have twenty years allowed her after her Husband's death to assert that right? It is impossible that she can have more than ten years: for the right to redeem *Hughes* was first in her Husband; and therefore her right could never give her more than ten years from the death of her Husband. *Belsh v. Harvey* (d).

If the right to redeem is considered as arising out of the nature of the Estate, we contend that the Husband and Wife had one entire joint Estate, and but one right of Redemption. But if the Court should be of opinion that the Wife's right did not accrue to her until her Husband's death, and that she is to have twenty years to assert it after that event, then we submit that there has been no acknowledgment of the Mortgage Title within that period; and that, at all events, it must be sent to the *Master* to inquire when the Money was really paid to *Hughes*.

The VICE-CHANCELLOR:—

The Possession of *Stephens* was not a Possession under the Mortgage. *Stephens* was never the Mortgagee. He professed to be the Purchaser of the Equity of Redemption, subject to the Mortgage, and was, in

(c) Rolls, 24th Feb. 1812; cited from a MS. Note, in the possession of Mr. Shadwell.

(d) 3 P. W. 287, in Note; and Sug. Vend. & Pur. Appendix, 35.

1823.

PRICE
v.
COPNER.

fact, by the effect of the Conveyance of 1774, the Owner of that Equity of Redemption during the Life of *Price*, the Father of the Plaintiff, and would, by the effect of it, have been the absolute Owner of that Equity of Redemption, if *Price*, the Father, had survived the Wife. *Price*, the Father, could make no Conveyance of the Joint Fee which could bind his Wife; and there being no Fine levied by the Plaintiff's Mother to confirm the Conveyance of 1774, her execution of that Conveyance by Signature was a mere nullity; and, upon the death of *Price*, the Father, in 1797, the Equity of Redemption in the Joint Fee survived to her. By the Conveyance of 1796, *Copner* became entitled both to the Mortgage, and to the Equity of Redemption, as far as *Price*, the Father, could transfer it. And if *Copner's* Possession from August 1796 be to be referred to his Mortgage Title (which may be doubtful) still it is a Possession within twenty years before the Bill was filed, and does not exclude Redemption by the Plaintiff.

The Exceptions to the *Master's* Report must be over-ruled.

1823.
12th April.

LYON v. MERCER.

THE Defendants in this Cause were *Tarback*, a Lunatic, and *Mercer*, the Committee of his Person and Estate. After the Decree had been made, *Mercer* died; upon which an Order was made in *Tarback's* Lunacy, appointing *Pilkington* to be the Committee of *Tarback's* Person and Estate in *Mercer's* place.

After a Decree in a Suit, in which a Lunatic and his Committee were Defendants, the Committee died, and a new one was appointed. Ordered, upon Motion, that the new Committee should be named, as such, in all future proceedings in the Cause.

Mr. *Cooper*, for the Plaintiff, now moved, that *Pilkington's* name might be substituted, as a Defendant, in *Mercer's* place; and cited *Johnson v. Legard (a)*, adding, that that Case had been searched for in the Registrar's Book, and that the entry of it was found to be, in substance, as follows:—Defendant, *T. Legard*, put in his Answer; afterwards a Commission of Lunacy issued against him, under which he was found a Lunatic. The Plaintiff filed a supplemental Bill against the Defendant (the Lunatic) and against his Committee; they put in their Answers; the Cause was heard, and a Decree made. By an Order made in the Lunacy, the Committee was discharged, and a new one appointed. Under these circumstances an application was made on the 2d of March 1816 to substitute the new Committee in the room of the former one; which, upon hearing Mr. *Wear*, of Counsel for the new Committee, and also for the old one, and an Affidavit of Notice of Motion to the other Defendants, was ordered accordingly (b).

The VICE-CHANCELLOR:—

I will follow that Case. My Order will be, that Mr. *Pilkington* be named as the Committee in all the future proceedings in the Cause.

(a) 2 Mad. Princ. & Pract. 523.

(b) Reg. Lib. A. 1815, fol. 556.

MEMORANDUM.

1823.
13th April.

Costs.

ON this day the *Vice-Chancellor* said, that in Michaelmas Term last he had stated to Mr. *Walker*, the Registrar, certain Questions, for the purpose of ascertaining in what cases the Costs of a Motion, where the Court gave no direction as to the Costs, became Costs in the Cause to a Party to whom Costs of Suit were given upon the hearing. The information he had obtained was,

- 1st. That the Party making a successful Motion is entitled to his Costs, as Costs in the Cause; but the Party opposing it is not entitled to his Costs, as Costs in the Cause.
- 2d. That the Party making a Motion which fails, is not entitled to his Costs, as Costs in the Cause; but the Party opposing it is entitled to his Costs, as Costs in the Cause.
- 3d. That where a Motion is made by one Party, and not opposed by the other, the Costs of both Parties are Costs in the Cause.

The *Vice-Chancellor* added, that it was therefore the duty of the Court, whenever by reason of special circumstances it was not the intention of the Court that these Rules should apply, to give particular directions with respect to the Costs; but that the Court very rarely gave any special directions with respect to the Costs of a Motion for the purpose of obtaining, continuing, or dissolving an Injunction to stay proceedings at Law, leaving the Costs of such Motions to abide the event of the Suit.

1823.
25th April.
31st May.

BURNEY v. MORGAN.

MORGAN v. BURNEY.

*Creditors.
Right of Revivor.*

Where one of the Plaintiffs in a Creditor's Suit dies after a Decree, his personal Representative has a right to revive.

Qu. if before a Decree.

A Creditor cannot sue on behalf of himself and others, who have no common interest with him.

THE question which arose in this Case was as to the right of Parties to revive and prosecute the Suit.

In the year 1765, Sir *J. P. Pryce* and his Wife, being seised, in right of the latter, of the *Eardleigh Court* Estate, subject to certain Mortgages, conveyed it to a Trustee, in Trust to sell. The Estate was accordingly put up to Sale, and *John Bagnall* became the Purchaser, and paid a Deposit. *Bagnall* entered into Possession, and redeemed the subsisting Mortgages; but did not pay the remainder of his Purchase-money; nor was any Conveyance ever executed to him, though he and his Devisees had all along continued in Possession of the Estate.

Sir *J. P. Pryce* died soon after the Sale. Lady *Pryce*, his Widow, in 1787 executed a Mortgage of the Estate in fee to *John Morgan*, to secure 1,500*l.* In 1799 she became indebted to *John Burney*, on Bond, for 1,000*l.* on which Judgment was entered up in the same year.

The original Bill was filed in 1804 by *Burney*, on behalf of himself and all other Judgment Creditors of Lady *Pryce*, *Morgan* and Lady *Pryce* also joining as Plaintiffs.

The Defendants to that Bill were *Bagnall's* Devisees in Trust, and the Persons in whom the legal Estate was vested under the Conveyance in 1765 in Trust for Sale.

The Bill insisted that *Bagnall* had entered into Possession of the Estate, not under the Agreement to sell to him, but as Mortgagee under the Mortgages which he had redeemed; and it prayed, that the Agreement for the Sale of the Estate might be declared not to be binding, or to have been waved, the Plaintiff, Lady *Pryce*, offering to re-pay the Deposit; and that the Plaintiffs might be let in to redeem the Mortgages which had been vested in *Bagnall*;—or, if the Court should consider the Agreement for the Sale to *Bagnall* binding, then that a specific Performance might be decreed, and the rest of the Purchase-money paid to Lady *Pryce*.

1823.
BURNLEY
v.
MORGAN.
—
MORGAN
v.
BURNLEY.

In 1805 Lady *Pryce* died; upon which *Burney* and *Morgan* filed a Bill of Revivor and Supplement against the Defendants to the original Suit, and also against the personal Representative of Lady *Pryce*, praying that, if necessary, an Account might be taken of what Charges and Incumbrances there were affecting the *Eardleigh* Court Estate, and of the Debts of Lady *Pryce* affecting the Estate, or payable out of the Purchase-money.

In 1814 a Decree was made in the Cause, establishing the Agreement for the Sale of the Estate, and directing the *Master* to take the Accounts usual in a Creditor's Suit.

In 1816 *Burney* died, and in 1817 his personal Representative filed a Bill of Revivor, to which *Morgan* was made a Defendant, as well as the original Defendants, he having declined to revive the Suit. The usual Order of Revivor was made, and the Suit was prosecuted.

1823.

BURNEY
v.
MORGAN.

MORGAN
v.
BURNBY.

In 1821 *Morgan* died; upon which his personal Representative filed a Bill of Revivor, to which he made the personal Representative of *Burney* a Defendant, as well as the former Defendants.

The Court was now moved on behalf of the personal Representative of *Morgan* (the Plaintiff in this last Suit), that the personal Representative of *Burney* might be restrained from proceeding in her Bill of Revivor, and that he alone might prosecute the original Decree.

After the Notice of Motion, *Morgan's* Representative amended his Bill of Revivor, by making it a Bill on behalf of himself and all other Creditors of Lady *Pryce*.

Mr. *Agar*, for the Motion, insisted that there could not be two Plaintiffs to prosecute the same Decree, and that the right to prosecute it belonged to the Plaintiff in the last Bill of Revivor, as the personal Representative of *Morgan*, who was the surviving Plaintiff in the original Suit.

Mr. *Whitmarsh*, for the Representative of *Burney*, insisted, that although *Morgan* was the surviving Plaintiff in the original Suit, yet that he had declined to revive it; and that the Bill of Revivor by the Representative of *Burney* had been acquiesced in by *Morgan* during his lifetime.

The VICE-CHANCELLOR:—

This Motion supposes that the Representative of *Burney* was irregular in the Bill of Revivor filed by her. I am not of that opinion. It is true that the death of *Burney*, who was the Co-plaintiff as a Judgment Creditor, did not abate the Suit, because the

other Plaintiff, *Morgan* the Mortgagee, could effectually prosecute the Decree, and had full interest to do so until his Debt was satisfied. But he had no interest in the further prosecution of the Suit for the benefit of the Judgment Creditors, and the personal Representative of *Burney* had therefore a right to claim, by Revivor, the same power of prosecuting the Suit for the benefit of the Judgment Creditors as *Burney* himself possessed. If *Morgan* had acted with the Representative of *Burney*, they might have joined as Co-plaintiffs in the Bill of Revivor. But the Representative of *Burney* could not lose her right to revive because *Morgan* did not act with her, and was therefore well justified in filing her own Bill of Revivor, and making *Morgan* a Defendant. It is a mistake to suppose, that in consequence of this Bill of Revivor *Morgan* lost any right to prosecute the Decree which he before possessed. Every party to a Suit is an actor after a Decree; and therefore the Representative of *Burney*, and *Morgan*, and the other Defendants, were all entitled to prosecute the Decree upon the Order of Revivor. And if the situation of *Morgan*, as surviving Plaintiff in the original Suit, entitled him to a preference over the Representative of *Burney* as a Plaintiff in the Bill of Revivor, where both were acting with equal diligence, it was his own fault if he did not assert it.

If the Representative of *Burney* had a right to file a Bill of Revivor, it necessarily follows that the Representative of *Morgan* had an equal right so to do upon the death of *Morgan*, and that his Bill is regular. And as the first personal Representative of Lady *Pryce* was then dead, it was necessary to make the new Representative of Lady *Pryce* a Party to the Bill of Revivor,

1823,

 BURNBY
 v.
 MORGAN.

 MORGAN
 v.
 BURNBY.

1823.

BURNEY
v.
MORGAN.
—
MORGAN
v.
BURNEY.

which had thus a double object. To this Bill of Revivor the Representative of *Burney* was a Co-defendant, and stands now in the same situation in the Cause as *Morgan* himself stood after her Bill of Revivor. But in truth they are all actors, and this varying relation of Plaintiff and Defendant makes no substantial difference. It may be observed, that this Decree goes farther than the Record warranted; inasmuch as it provides for the Administration of the Estate for the benefit of all Creditors; whereas the Plaintiffs in the Suit were only a Mortgagee, and a Judgment Creditor. The Representative of *Morgan* has, since this Motion was depending, amended his Bill of Revivor, by stating it to be a Suit on behalf of himself and all other Creditors. This Amendment was not necessary to support his Bill of Revivor, and can answer no useful purpose. A Mortgagee has no common Interest with the Creditors at large, and cannot sue on their behalf. This Motion being founded altogether on a misapprehension of the effect of the Proceedings in the Cause, and being wholly irregular, must be refused, with Costs.

In White v Hillman 346. 605 acc.

BRETON v. LORD CLIFDEN.

WILLIAM BRETON was entitled under the Decree of the Court to a Life Interest in a Sum of 10,500*l.* four-per-cent. Stock, standing in the Name of the Accountant General; and after his death, his Wife, *Susannah Breton*, was entitled to an Annuity of 200*l.* for her Life out of the Dividends of this Fund. And, subject to that Annuity, the Fund was divisible amongst the Children of the Marriage, as *William Breton* should appoint. *William Breton* duly appointed 2,500*l.* part of the 10,500*l.* to *Eliab Bracknell Breton*, the eldest Son of the Marriage.

A Petition was now presented by *William Breton*, and *Susannah* his Wife, and *Eliab Bracknell Breton*, praying, that the sum of 2,500*l.* so appointed to *Eliab Bracknell Breton*, might be sold, and the produce paid over to him.

Mr. Sugden, for the Petition, admitted that there was a difficulty, owing to the Interest which the Wife of *William Breton* had in this Fund, in respect of her Annuity of 200*l.* But he contended that the sum of 8,000*l.* four-per-cent. Stock, which would remain after the Prayer of this Petition was complied with, must be considered an ample Security for an Annuity of 200*l.*; and that a compliance with the Prayer of this Petition would not diminish the Security for the Annuity to such a degree as would induce the Court to refuse the Order.

Mr. Phillimore consented, for Persons entitled to Annuities chargeable on the Life Interest of *William Breton*.

1823.
24th April.
30th May.

A married Woman, being entitled to an Annuity of 200*l.* out of the Dividends of 10,500*l.* four-per-cent. Stock, which, subject to the Annuity, was divisible amongst the Children of herself and her Husband as he should appoint: the Husband appointed 2,500*l.* to his eldest Son. The Court refused to order that sum to be transferred to the Son, although the Remainder would have been much more than sufficient to pay the Annuity.

1823.

BRETON
v.
Lord CLIFDEN.

The *Vice-Chancellor* said, that as *Mrs. Breton*, as a Feme Covert, was incapable of consenting to a diminution of the Fund by which the Annuity of 200*l.* was secured for her in case she survived her Husband, he did not consider that the Order could be made; but directed the Petition to stand over, that there might be time to inquire whether there was any precedent for such an Order.

Mr. Bell, amicus curiæ, said, he recollected a case in which Lord *Alvanley* had refused to make a similar Order.

30th May.

The *Vice-Chancellor* said, that no Precedent was found for such an Order; and that he could not diminish the Security for the Wife's Contingent Annuity, and must therefore refuse the Prayer of the Petition.

1823.

26th April.

RENVOIZE v. COOPER.

Where, in a Foreclosure Suit, Exceptions are taken to the Master's Report, and the time appointed for payment of the Mortgage-money is likely to elapse before the Exceptions are heard, the Defendant should apply to the Court, upon the Exceptions being filed, to have the time enlarged until the Exceptions are disposed of.

THIS Suit was instituted to foreclose the Equity of Redemption of a Freehold Estate, which had been mortgaged by the Defendant *Cooper*, to one *Timmins*, deceased.

An Order having been made, directing the *Master* to settle the proper Deeds for the Re-conveyance of the mortgaged Premises to the Defendants, they insisted, that *Timmins's* Heir at Law was a necessary Party to the Re-conveyance. On the 27th of February 1821, it

apply to the Court, upon the Exceptions being filed, to have the time enlarged until the Exceptions are disposed of.

was ordered, that the time for foreclosing the Defendants should be enlarged; and it was referred to the *Master* to appoint a new time for payment of the Principal and Interest due on the Mortgage; and to inquire, and state to the Court, whether *Timmins's* Heir at Law was a necessary Party to the Re-conveyance. The *Master*, by his Report, directed the Principal and Interest to be paid on the 25th of August 1821, and certified that the Heir at Law was not a necessary Party to the Re-conveyance. On the 22d of June 1821, the Defendants filed Exceptions to the *Master's* Report. Pending these Exceptions, the time appointed for payment of the Principal and Interest elapsed. The Exceptions were, however, ultimately over-ruled.

1823.

RENVOIZE
v.
COOPER

Mr. *Phillimore*, for the Plaintiffs, now moved that the Defendants might be foreclosed.

Mr. *Pepys*, for the Defendants, opposed the Motion.

The VICE-CHANCELLOR:—

The Defendants, the Mortgagors, should regularly have applied to the Court to have the time appointed for payment of the Principal and Interest enlarged, until the Exceptions should be disposed of. But I cannot, for this slip on their part, conclude their right of Redemption. Let it be referred back to the *Master* to compute subsequent Interest, and to appoint a new time of Payment.

1823.
29th April.

SPARKE v. IVATT.

Where a Decree directs Issues to try the validity of Moduses, and the Plaintiff wishes to have the Issues tried in a different County from that in which the Lands lie, an Order for that purpose can not be inserted in the Decree, but must be obtained by Petition.

THE Bill was filed by the Rector of the Parish of *Cottenham*, in *Cambridgeshire*, for an Account of Tithes. The Defendants, by their Answers, pleaded several Moduses.

The *Vice-Chancellor*, at the hearing of the Cause, directed Issues to try the validity of some of the Moduses. Upon which, Mr. *Wetherell*, for the Plaintiff, requested that the Issues might be directed, in the Decree, to be tried in *Essex*, instead of *Cambridgeshire*.

The *Vice-Chancellor* said, that an Order to that effect could not be made part of the Decree, without Consent; because the propriety of it depended upon circumstances which were extrinsic to the Pleadings and Proofs; but that a Petition must be presented for the purpose of obtaining it.

DOWLIN v. MACDOUGALL and HUNTER.1823.
29th April.**Parties.**

THE object of this Suit was, to set aside a Purchase which had been made by the Defendant *Macdougall*, of a Share of an Intestate's Estate, and to have the Surplus of the Monies received by him on account of the Purchase, after deducting the amount of the Purchase Money, paid to the Plaintiff.

After the Pleadings had been opened, the Counsel for the Defendant *Macdougall* objected to the Cause being heard, because the Personal Representative of *Martin Dowlin* was not made a Party to the Suit.

The following are the facts of the Case, which it is necessary to state, in order to explain the grounds of this Objection:

All the Intestate's Estate and Effects recoverable under the Letters of Administration, had been assigned to Trustees in Trust, as to one sixth part, for the Appointees of Mr. and Mrs. *Dowlin*; and in default of Appointment, in Trust for them, and the Survivor of them. Shortly after this Assignment, *Macdougall* purchased this sixth part of Mr. and Mrs. *Dowlin*, and they assigned it to him accordingly. In 1815, Mr. *Dowlin* died; and in the next year Mrs. *Dowlin* died, having bequeathed all her Estate, both Real and Personal, to the Plaintiff. Letters of Administration, with Mrs. *Dowlin*'s Will annexed, were granted to the Defendant *Hunter*. *Macdougall*, as the Bill alleged, had received 643*l.* 8*s.* 3*d.* on account of his Purchase.

A Share of an Intestate's Personal Estate was assigned to Trustees, in Trust for the Appointees of Husband and Wife; and in default of Appointment, in Trust for them and the Survivor. Husband and Wife sold and assigned this Share. The Husband died first, and then the Wife, having bequeathed all her Personal Estate to the Plaintiff. The Husband's personal Representative is not a necessary Party to a Bill by the Legatee to set aside the Sale.

1823.

DOWLING
v.
MACDOUGALL
and HUNTER.

Mr. *Heald*, and Mr. *Barber*, for the Defendant
Macdougall :—

As Mr. *Dowlin* joined with his Wife in the Sale and Assignment to *Macdougall*, there cannot be a doubt that he thereby reduced this Share into Possession. No person, therefore, is entitled to set aside this Sale, except Mr. *Dowlin*'s Personal Representative. But if there be a *doubt* even upon this question, it cannot be decided in the absence of *Dowlin*'s Personal Representative.

Mr. *Bell*, and Mr. *Palmer*, for the Plaintiff.

The VICE-CHANCELLOR :—

I think the Personal Representative of Mr. *Dowlin* is not a necessary Party. If the Sale to Mr. *Macdougall* be good, then he plainly has no Interest; and if the Sale be void, he has no Interest, because, in substance, *Macdougall* remained a Trustee for the purposes of the Settlement; and Mrs. *Dowlin* having survived her Husband became solely entitled under the Settlement.

*Sc. affirmed on appeal 5 H. 6 - 142.
Butcher Supd. V. P. G. 2d. - 268. n.*

THOMAS PARRY JONES PARRY, - Plaintiff.

1823.

1st and 5th May.

AND

HENRY WRIGHT, GRIFFITH PARRY, and
WILLIAM ALEXANDER MADOCKS, and H.
C. BERKLEY, - - - Defendants.

*Mortgage.
Priority.*

If a third Incumbrancer, having constructive notice of the second Mortgage, fails to keep the first Security on foot for his protection, he is not entitled to stand in the place of the first Mortgagee against the second.

IN April 1801, the Defendant, *Griffith Parry*, being seised in Fee of an Estate in *Carnarvonshire*, subject to certain Mortgages which were then vested in *Sir Thos. Mostyn, Bart.* executed a Mortgage of it to the Plaintiff, to secure 203*l.* 11*s.* 6*d.* and Interest. In December 1807, he agreed to sell this Estate, together with certain other Lands, to *Madocks*, for 8,300*l.* out of which *Madocks* was to retain 5,010*l.* to pay off the Incumbrances on the Premises agreed to be sold; and also 1,800*l.* as the consideration for granting an Annuity to *G. Parry*, to be charged on the same Premises. Accordingly Indentures of Lease and Release, dated the 15th and 16th of December 1807, were executed; by which, after reciting the Mortgages to *Sir Thomas Mostyn* and the Plaintiff, the Agreement for the Sale and for the payment of the Incumbrances, including the Plaintiff's Mortgage, *G. Parry* conveyed the Premises to *Madocks* in Fee, and covenanted with him that the Plaintiff and all the other Incumbrancers should, on being paid their Principal and Interest out of the 5,010*l.*, execute to him proper Assignments of their Securities.

By Indentures of Lease and Release of the 21st and 22d of June 1810, the Release being made between *Sir Thomas Mostyn* of the first part; *Madocks* of the second part; and *Girdlestone* of the third part; after reciting

1823.

PARRY
v.
WRIGHT
and others.

Sir *Thomas Mostyn's* Mortgages, the Conveyance to *Madocks*, and that he was desirous of paying off those Mortgages, and of procuring a Re-conveyance of the mortgaged Premises, Sir *Thomas Mostyn*, in consideration of 3,220*l.* therein mentioned to have been paid to him by *Madocks*, in full satisfaction of his Claims under those Mortgages, conveyed the Premises, by the direction of *Madocks*, to *Girdlestone* in Fee; and it was declared, that one *Garnons*, in whom the Premises were vested for the residue of a term of five hundred years, in Trust for *Mostyn*, should thenceforth stand possessed of the Term in Trust for *Girdlestone*, to attend the Inheritance, and to protect it from all mesne Incumbrances.

By an Indenture of even date with, and executed immediately after, and reciting the last-mentioned Indenture, and also reciting that *Wright* had agreed to purchase of *Madocks* an Annuity of 500*l.* for 5,000*l.* and that the 3,220*l.* were in fact the Monies of *Wright*, and part of the 5,000*l.* and were paid by *Berkley*, as *Wright's* Agent, to Sir *Thomas Mostyn*, at *Madocks's* request, *Madocks*, in consideration of the 3,220*l.* paid to Sir *Thomas Mostyn*, and of 1,780*l.* the Residue of the 5,000*l.* paid to him by *Berkley*, as *Wright's* Agent, granted to *Wright* an Annuity of 500*l.* to be issuing out of the Premises purchased of *G. Parry*; and *Girdlestone*, by *Madocks's* direction, demised the same Premises to *Berkley* for five hundred years, upon Trust for better securing the Annuity.

The Plaintiff not having been paid the Principal and Interest due on his Mortgage, filed his Bill, and insisted that he was entitled, either to be paid by *G. Parry*, *Madocks*, or *Wright*, or to foreclose their Equity of

1823.

PARRY
v.
WRIGHT
and others.

Redemption; and he charged that the 3,220*l.* ought to be considered as paid by *Madocks* out of the 5,010*l.* under the Indenture of the 16th of December 1807: That the Assignment of the Securities for the 3,220*l.* was made in Trust for *Madocks*, and not for *Wright*: That *Wright* had notice of his charge, or of the Indentures of April 1801, and December 1807: That *Wright's* Annuity Deed recited the Release of the 16th of December 1807, and the Assignment of Sir *Thos. Mostyn's* Securities: That thereby he knew, or ought to be considered as having had notice of the Plaintiff's Mortgage, and that *Madocks* had retained the 5,010*l.* out of the Purchase Money for paying off the Incumbrances, and especially the Plaintiff's Mortgage, and had not done so; and that under these circumstances, although it was alleged that *Wright* had paid the 3,220*l.* yet that he paid it out of the Purchase Money for his Annuity, and that he ought to be considered as having paid off, and that he did, in fact, pay off, the Sums due to Sir *Thomas Mostyn*, on *Madocks's* behalf; and that thereby the Plaintiff became the first Incumbrancer on the Premises. And the Bill prayed a Foreclosure against the Defendants in the usual terms.

Wright, by his Answer, stated, that when he contracted for his Annuity, it was agreed that Sir *Thomas Mostyn's* Securities should be paid off out of the 5,000*l.*, and that the 3,220*l.* paid to *Mostyn* were *Wright's* proper Monies, and therefore ought not to be considered as paid by *Madocks* out of the 5,010*l.* He admitted that the Assignment of *Mostyn's* Securities was made to *Girdlestone*, in Trust for *Madocks*(a); but he said that his Annuity Deed bore even date with the Assign-

(a) There was no Trust declared by the Deed.

1823

PARRY
v.
WRIGHT,
and others.

ment, and that *Girdlestone* was made a Party to the Annuity Deed the more effectually to secure to him all the benefit of that Assignment, in consideration of his Money having been applied in paying off the Incumbrances. He denied that he had any notice of Plaintiff's charge, or of the Indentures of April 1801, and December 1807, before he paid the 5,000*l.*; but he admitted that the Assignment of *Mostyn's Securities*, and also the Release of the 16th of December 1807, were recited in his Annuity Deed; but he added, that the latter Deed was recited as follows: "That by Indentures of Lease and Release, bearing date respectively on or about the 15th and 16th days of December 1807, and made, &c. It was witnessed, that, *for the consideration therein mentioned*, the said *G. Parry* did grant, bargain," &c.: and he submitted, that he ought not to be considered as having had notice of the Plaintiff's Mortgage, or that *Madocks* had retained the 5,000*l.* out of the Purchase Money for paying off the Incumbrances, but had not done so; and that he was the first Incumbrancer on the Premises; and that the Plaintiff had no claim thereon until he had paid to him, *Wright*, the 3,220*l.* and Interest.

Mr. *Bell*, and Mr. *Koe*, for the Plaintiff:—

I. *Wright* had sufficient notice of the Plaintiff's security. The Release of December 1807 expressly takes notice of the Mortgage to the Plaintiff. The Deeds of June 1810 state *Madocks's* Title to be under the Lease and Release of December 1807; and those Deeds state that he has no Title except under certain Mortgages, and, amongst them, the Mortgage to the Plaintiff; therefore no Purchaser from *Madocks* can be permitted to say he had no notice of these Mortgages. Although the 3,220*l.* was *Wright's* Money, yet it was

was paid through *Madocks*, and the securities were assigned to his Trustee; so that it was, in fact, a mere payment by *Madocks*.

1823.

PARRY
v.
WRIGHT,
and others.

II. The principle upon which Sir *William Grant* decided *Toulmin v. Steere* (b) applies in this Case. *Madocks* had an Estate subject to an Agreement, by which he was expressly bound to pay off certain Mortgages, and therefore he had nothing at all but an Equity of Redemption in the Premises. He contracted with *Wright*, who knew that there were those Charges and Incumbrances on the Estate, to borrow of him 5,000*l.* and at the same time stipulated that those Mortgages and Incumbrances should be conveyed to a Trustee for him. *Girdlestone* being a Trustee for *Madocks* was of course a Trustee for the express purpose of taking care that these Mortgages were paid. The Conveyance to *Girdlestone* is not made in the usual way to protect the Parties. If that had been their intention they would have taken an Assignment of the Mortgages. They do not do so; but they completely extinguish the Mortgages. The effect would have been quite different if the Mortgages had been conveyed to *Girdlestone* as a Trustee for *Wright*, subject to the Equity of Redemption; but the Deed expressly declares that the Estate was not to remain subject to the Equity of Redemption. Unless it had been declared that these Mortgages had been given as a Security for the Annuity, *Wright* could not have set them up as subsisting against *Madocks*. Though they were not conveyed to *Girdlestone* in Trust for *Madocks* expressly, yet it amounts to the same thing; for it appears that they were paid off with *Madocks's* Money; and then they were assigned to

(b) 3 Mer. 210.

1823.

PARRY
v.
WRIGHT
and others.

Girdlestone by the direction of *Madocks*: so that *Girdlestone* is a Trustee for *Madocks*, who paid the Money with which the Mortgages were discharged. It would be a fraud to consider it in any other way; for the intention was not that *Wright* should become the Purchaser of these Securities, but that he should be an Annuity Creditor of *Madocks*, and not stand in the place of the Mortgagees. He does not even purchase the Equity of Redemption; but he takes the Annuity; which is a distinct thing. The question is, whether, as against the Plaintiff, of whose Mortgage he had notice, he can now say that it was not the intention that he should be an Annuity Creditor, but a Mortgagee. It is clear that he never could contend, as against *Madocks*, that he was any thing but an Annuity Creditor; and if not, can he say, that, as against the Plaintiff, he stands in the situation of a Mortgagee, and that he has a right to foreclose him. Admitting the Assignment to *Girdlestone*, and the Demise to *Berkley*, to be but one transaction, still the effect of it was to extinguish the Mortgage Right, and to create a new substantive Right. The purpose of it was, not to maintain in *Wright* the character of Mortgagee against the Plaintiff, but to create a new character in him as against *Madocks*, and, therefore, a new character in him as against all those whose claims were prior to *Madocks's*. And if *Wright* had lost his character of Mortgagee against *Madocks*, he has lost it against the Plaintiff, who, by Foreclosure, is entitled to stand in *Madocks's* place.

Mr. Heald, Mr. Sugden, and Sir George Hampson,
Bart. for the Defendant:—

Prior to the Plaintiff having any Charge upon this Estate, it was subject to certain Incumbrances which exhausted the whole Fee-simple, and divested the legal

1823.

PARRY
v.
WRIGHT
and others.

Estate. Then he takes a Mortgage, which was only an equitable one, subject to all the Debts on the Estate; and then *Madocks* buys the Estate, not with any privity or concurrence of the Plaintiff, but subject to the Mortgage and all the other Incumbrances; and he agrees with the Sellers that he should pay off all Incumbrances. Now that gives no right to the Plaintiff, as he was no Party to that Agreement. For it has been decided that where a party creates a charge in favour of a person who is not privy to the transaction, the Incumbrance may be discharged without that person's consent. There is also the case of *Walkwyn v. Coutts* (c), where it was held that the Court would not give a Party in the situation of the Plaintiff any benefit of an Agreement for which he gave no Consideration. *Forbes v. Moffatt* (d). This arrangement was made for the convenience of the other Parties. There was never any intention to give the Plaintiff any priority or preference which he did not before possess. All that was intended was, to place *Madocks* in the place of the Sellers. So that it stands thus: *Madocks* had an Equity of Redemption, and the intention of the Parties was, that as there was a prior load of Debt riding over the Plaintiff's Mortgage, the person who advanced the Money should have the benefit of the prior Incumbrances. Suppose that *Mostyn* had transferred his Mortgages without *Madocks's* concurrence, *Wright* would then have stood in *Mostyn's* place. The concurrence of the Party having the Equity of Redemption does not place him in a worse situation. If the Money had belonged to *Madocks* himself, then perhaps *Wright* might have stood in a worse situation than *Mostyn* did. The Plaintiff cannot vary the case as it really stands; he cannot have more Equity than

(c) 3 Mer. 707.

(d) 18 Ves. 384.

1823.

PARRY
v.
WRIGHT
and others.

and that he would have had the same Priority as he had before, the question is, whether the form of the transaction vesting the Fee Simple in *Girdlestone*, and the subsequent Demise by him to *Berkley* as a Trustee for an Annuity Creditor and not for a Mortgagee, be a discharge to the Plaintiff, and relieves him from all the Securities given to *Mostyn*. The Court looks at the substance, and not at the form, of the transaction: what then was intended by this transaction? As against *Madocks*, it was to secure an Annuity of 500*l. per annum*; and as to the persons who claimed posterior to *Madocks*, to secure that same Annuity as against them. Then why should they not be considered as subsisting Securities as against those persons? Has any injury been done to them? Who can say that they are not Mortgage Securities? As the legal Estate has never found its way to *Madocks*, the Plaintiff cannot call upon us to give him the prior legal Estate which we have gotten as a consideration for our Annuity. That would be against the nature of the transaction; the object of which was to give us the benefit of *Mostyn's* Securities. And we cannot be deprived of that benefit by the form of our Conveyance. That Conveyance was not meant merely to destroy the Mortgages, and to let in the Plaintiff as the first Incumbrancer. We never contracted to be Owners of this Estate discharged of all Incumbrances; but we contracted for the benefit of the prior Incumbrances. We have never discharged those Incumbrances; for though we have got the legal Fee in *Girdlestone*, no Trust was ever declared for *Madocks*; but it was for our benefit. The Plaintiff must show some distinct ground which has discharged the Property against the real nature of the Contract and the justice of the Case. He has given no other consideration for the Estate than what he gave in the year

1801: what Equity can he then have to oust us of that which we have legally bought, unless he will repay us the Money which we have expended in buying up these Securities? The Purchaser of the Annuity is the Purchaser of the Estate to the extent of that Annuity; and every Purchaser is allowed to take in prior Incumbrances. If the contrary is held in this Case, where there is no fraud or unfair dealing, but the Money was fairly advanced, it will shake many Securities in a manner we cannot anticipate.

1823.
PARRY
v.
WRIGHT
and others.

Mr. Girdlestone, for the Defendant *Berkley*:—

The Defendant *Madocks* was out of the Jurisdiction of the Court, and the Bill had been taken *pro confesso* against him.

The VICE-CHANCELLOR:—

When the Money of the Defendant *Wright* was applied in satisfaction of the Mortgage Debt due to Sir *Thomas Mostyn*, the Parties might have made an arrangement which would have kept Sir *Thomas Mostyn's* Securities on foot as against the Plaintiff *Jones Parry*. If they have failed to do this, no Court can give an effect to their Instruments contrary to their own clear and express intention. I agree that it is of no consequence that the Grant of the Annuity, and the Redemption of Sir *Thos. Mostyn's* Mortgage, are split into two Instruments, and that the whole is to be considered as one transaction. Mr. *Wright*, who was actually, though not constructively, ignorant of the existence of the Plaintiff's Mortgage, agrees to give Mr. *Madocks* 5,000*l.* for the purchase of an Annuity, upon condition that 3,220*l.* part of the sum, is applied in Redemption of the Mortgage to Sir *Thomas Mostyn*, which he seems to have considered as

1823.

PARRY
v.
WRIGHT
and others.

the only Incumbrance upon the Estate. The Money is accordingly paid to Sir *Thomas Mostyn*, and the Fee of the Estate is vested in *Girdlestone*, in Trust for Mr. *Madocks*, and then, out of this Fee, Mr. *Girdlestone* grants, by the direction of Mr. *Madocks*, a term of five hundred years to Mr. *Berkley* as a Trustee for Mr. *Wright*, for the purpose of securing his Annuity. How then can Mr. *Wright*, who accepts this term of five hundred years from Mr. *Girdlestone*, as a Trustee of the Fee for Mr. *Madocks*, contend that it was not the true intention of this transaction that Mr. *Girdlestone* should hold the Fee in Trust for Mr. *Madocks*. If it were the true intention of this transaction that the Fee conveyed by Sir *Thomas Mostyn* should vest in Mr. *Girdlestone* as Trustee for Mr. *Madocks*, then the consequence is unavoidable, that neither Mr. *Madocks*, nor any person claiming under him, with notice of the Plaintiff's Mortgage, can ever set up this Fee against the Title of the Plaintiff. And it is not denied that Mr. *Wright* had constructive notice of the Plaintiff's Mortgage. The Plaintiff, therefore, is to be considered as the first Incumbrancer upon this Estate, and is entitled to his Decree accordingly.

CASAMAJOR v. STRODE.

1823.
9th May.

Practice.
Injunction.

ON the 27th of July 1822 an Order was made in this Cause, on the application of the Plaintiff, that Mr. *Burk*, the Purchaser of Lot 5, part of the Estates in question in the Cause, should either pay his Purchase-money into Court, on or before the first day of Hilary Term then next, or should deliver up the Possession which he had acquired of the purchased Premises.

Mr. *Burk* having paid no attention to this Order,

Mr. *Bell*, for the Plaintiff, now moved, upon Affidavit, that Mr. *Burk* might be ordered to deliver up the Possession of the Premises within a week, and that, in the mean time, he might be restrained by the Injunction of the Court from felling, topping, or removing any Timber or other Trees or Underwood, on or from the Premises, and also from making Bricks, Tiles or Pipes thereon, and from committing any Waste, Spoil, or Deterioration on the Premises; and he said, that although Mr. *Burk* was merely a Purchaser, and not a Party to the Cause, yet the Court would grant the Injunction.

An Injunction may be obtained, upon Motion, to restrain a Purchaser under a Decree, not a Party to the Cause, who has not paid his Purchase-money, from committing Waste on the Property purchased.

The VICE-CHANCELLOR :—

The Purchaser under a Decree does, by the act of Purchase, submit himself to the jurisdiction of the Court as to all matters connected with that character. Take the Injunction as prayed.

1823.
10th May.

*Settlement.
Construction.*

Settlement of a sum of Money upon Trust, to be transferred to the surviving Parent, for the benefit of him or her, and any Child or Children of the Marriage: held, upon construction of the whole Instrument, that the surviving Parent took for Life, with Remainder to the Children.

CHAMBERS v. ATKINS.

THIS Suit was instituted for the purpose of having the Rights of *Samuel Chambers* and his Children declared, as to a sum of 6666 *l.* 13s. 4d. stock. The Bill was filed by the Children, who were all Infants, against their Father, and the Trustee in whose name the Stock stood; and the question was, as to the construction of the Marriage Settlement by which the Trusts of this Fund were declared. The Settlement was dated the 9th of March 1807, and was made in the West Indies, previous to the Marriage of the Defendant, *Samuel Chambers*, with *Susannah* his Wife; and the Parties to it were the intended Wife, and her Father, of the first part, the Defendant, *Samuel Chambers*, of the second part, and two Trustees of the third part. By this Deed the Husband assigned and transferred the sum of 4000 *l.* to the Trustees, upon Trust to invest it, in the Public Funds, and to pay the Dividends to him during the joint Lives of himself and his Wife; and, on his decease, in case his Wife should survive him, upon Trust to transfer the Trust Fund to her, her Executors and Administrators, to and for the use of her and any Child or Children of the Marriage. The Settlement then proceeded in these words: "But in case the said *Samuel Chambers* should survive the said *Susannah Wylly*, his intended Wife, upon Trust to re-assign and transfer the sum of 4000 *l.* or such Public Stocks or Government Securities as may have been purchased with the same, unto the said *Samuel Chambers*, his Executors and Administrators, to and for the use and benefit of him, the said *Samuel Chambers*, and any Child or Children of the said intended Marriage."

After the Marriage, the Trust Fund was invested in the Purchase of 6666*l.* 13*s.* 4*d.* three per Cent. Stock. The Wife died in 1813, leaving the Plaintiffs, the only Issue of the Marriage.

1823.
CHAMBERS
v.
ATKINS.

The Bill insisted that the Plaintiffs, and their Father, the Defendant, *Samuel Chambers*, became, on the death of their Mother, each entitled to have one fourth Share of the Trust Fund, and to have each Share transferred to them, or secured for their benefit. The Defendant, *Samuel Chambers*, by his Answer claimed to be entitled to the Dividends for Life; and submitted, that according to the true construction of the Settlement, his Children, on his death, would be entitled to the Principal in equal Shares.

Mr. Horne, and *Mr. Roupell*, for the Plaintiffs.

Mr. Robert Roupell for the Defendant, *Samuel Chambers*.

Mr. Agar, and *Mr. Beames*, for *Atkins*, the Trustee.

The VICE-CHANCELLOR :—

During the joint Lives, the Husband and Wife had plainly an equitable interest in the Dividends. At the death of either, the principal sum was to be paid or transferred to the Survivor, his or her Executors or Administrators, so as to vest in the Survivor the absolute legal Interest and Possession; and there arise three questions :

First. Was it the intention that this Money should be placed at the disposition of the surviving Parent, for the purpose of enabling such Parent the better to pro-

1823.

CHAMBERS

v.

ATKINS.

vide for the Family ; or, *Secondly*, that the surviving Parent should take for Life, and the Children in Remainder ; or, *Thirdly*, that the surviving Parent and the Children should take as joint Tenants ?

The latter construction is favoured by the immediate expression. But if this had been the purpose of the Instrument, the Trustees would not have been directed to transfer the Fund to the surviving Parent, his or her Executors, or Administrators ; but would have been directed to hold upon Trust, for the equal benefit of the surviving Parent and Children. The first construction has some support in probable Intention ; but the strong expression that the surviving Parent is to hold the 4000*l.* to and for the use of him or her, and the Child or Children of the Marriage, cannot, I think, be safely treated as conferring no Interest upon the Children. And upon the whole, in this very doubtful Case, I am disposed to adopt the middle construction, and to say, that the Intention was not only to provide for the surviving Parent, but to make a certain Provision for the Child or Children of the Marriage, and yet not to create an immediate Trust for the equal benefit of the surviving Parent and Children ; and that the surviving Parent was to enjoy the Fund for Life, (which in some measure accounts for the Fund being transferred to the surviving Parent) and that the Children were to take in Remainder after the death of the surviving Parent.

The Fund must therefore remain in Court during the Life of the Father, and the Dividends be paid to him, with liberty to any party interested to apply at his death.

TEALE v. TEALE.

THE object of this Suit was to have the testimony of Witnesses perpetuated as to the Legitimacy of the Plaintiff, whose Title to an Estate depended upon his being the legitimate Son of one *R. Teale*.

1823.
15th May.

Practice.
Publication of
Depositions
in Suits to perpetuate Testimony.

The Witnesses who had been examined as to the fact in question had since died; and the Plaintiff having agreed to sell the Estate, and being unable to find the Register of his Birth or Baptism, the Purchaser refused to complete his Contract, unless the Plaintiff could produce copies of the Depositions of the Witnesses.

The Court will not order Copies of Depositions taken to perpetuate the Testimony of Witnesses to be delivered out for the purpose of perfecting the Title to an Estate, even where the Witnesses are dead.

Mr. *Roupell* moved, upon Affidavits of these facts, that the Plaintiff's Clerk in Court might be ordered to deliver a copy of the Depositions to the Plaintiff or his Solicitor; and he cited *Harris v. Cotterell* (a).

The VICE-CHANCELLOR:—

The Registrar has produced to me a late Case before the *Lord Chancellor*, in which a similar Application being made for a similar purpose, his Lordship refused the Order; and I adopt that Precedent.

(a) 3 Mer. 678.

1823.
15th May.

*Opening of
Biddings.*

Where several Lots have been purchased by the same Person, and the Biddings are ordered to be opened as to some of them, which were first purchased, the Purchaser will be allowed the option of opening the Biddings as to the Remainder.

PRICE v. PRICE.

MR. TRESLOVE moved to open the Biddings for five out of seven Lots that had been bought by the same person.

Mr. Knight, for the Purchaser, said, that where the same person purchased several Lots, and the Biddings were opened as to some of them, it was usual to give him the option of retiring from the remainder; and he cited *Boyer v. Blackwell* (a).

The *Vice-Chancellor* asked whether the Lots which were the subject of the Motion had been sold before or after the other two Lots; and being informed that they were sold after, he said, that where a person became the Purchaser of a subsequent Lot, in consequence of his being declared the best Bidder of a prior Lot, it was reasonable that he should have the option of retaining or retiring from the subsequent Lot.

The same point occurred again before the *Vice-Chancellor*, on the 6th December 1823, in the Case of *Fielder v. Fielder*; and the *Vice-Chancellor* made the Order for discharging the Purchaser as to the subsequent Lot, upon an Affidavit of the Purchaser that he had bid for the Lot in consequence of having been declared the best Bidder for the prior Lot, the Bidding of which was opened.

(a) 3 Anst. 656.

HORWOOD v. WEST.

JOHN POWELL, by his Will, gave to his Wife, *Margaret Powell*, all such ready Money, Money out at Interest, or in the Public Funds, or upon Government or Real Security, Debts and Securities for Money, as he should be possessed of, interested in, or entitled to at the time of his decease; and also all his Household Furniture, Stock in Trade, Plate, Linen, and China, as also all other his Estate and Effects whatsoever and wheresoever, for her own sole use and benefit, relying on her, that if she should thereafter intermarry, she would secure to herself whatever she should possess herself of by virtue of his Will, so that the same should not be subject to the Debts, Contracts, Control, or Engagements of any Husband she might so thereafter intermarry; and he thereby recommended his Wife that she should, by her Will, give and bequeath what she should die possessed of under his Will, in manner following, that is to say; one moiety or half part between and amongst his two Sisters, *Lettice* and *Mary*, in equal shares and proportions, if they should be living at the time of her decease; but if they should not be living at that time, then to direct the same to be paid and divided amongst all and every such of the Child or Children of his Sisters *Lettice* and *Mary* as should be living at the time of their decease, in equal Shares and Proportions; and the other moiety or half part he directed to be divided between *Jane Gordon* and *Ann Roderick*, his Wife's two Sisters, in equal Shares and Proportions; but if they should not be living at the time of her decease, then to direct that moiety or half part to be paid and

1823.
15th and 31st
May.

Will.
Construction.
Trust.

Testator gave to his Wife all his Personal Estate, relying, that if she should marry again she would secure whatever she should possess under his Will for her separate use; and he recommended her to give, by her Will, what he should die possessed of under his Will to certain Persons whom he named: held, that the Wife's Executor was a Trustee of the whole of the Property possessed by her under the Will for the Persons named.

1823.

HORWOOD
v.
WEST.

divided between and amongst all and every such of the Child or Children of *Jane Gordon* and *Ann Roderick* as should be living at the time of their decease, in equal Shares and Proportions; and he appointed his Wife and the Defendant Executrix and Executor of his Will.

Mrs. *Powell*, after her Husband's death, possessed herself of the whole of his Personal Estate; and after paying his Debts, and Funeral and Testamentary Expenses, applied the whole of the Residue to her own use, except a part, which she invested in the purchase of 400*l.* Stock, in the joint Names of herself and the Defendant, *West*. By her Will she gave all her Stock in the Public Funds standing in the names of *West* and herself, and all the Residue of her Personal Estate, one half to *Lettice*, and the other half to *Mary*, the two Sisters of her late Husband *John Powell*; and in case of the death of either of them in her life-time, she gave the Share of the one so dying to her Children, in equal parts, and appointed the Plaintiff her Executor.

Mrs. *Powell* received the Dividends of the 400*l.* Stock during her Life; and at her decease, that Sum remained standing in her and the Defendant's joint Names. The Bill prayed that *West* might be decreed to transfer the Stock to the Plaintiff, for the purposes of the Will.

Mr. *Bell*, and Mr. *Parker*, for the Plaintiff, referred to 2 Roper on Legacies, chap. 16, p. 308, in which the Cases on the subject were collected, and to *Attorney General v. Hall* (a).

Mr. *Temple*, for the Defendant.

(a) 8 Vin. Abr. 456:

The VICE-CHANCELLOR :—

It is essential to the execution of a Trust that the subject should be certain ; and if this Testator intended that his Wife should, at her pleasure, during her Life, dispose of the Property which he left to her, and that his recommendation should extend only to what, if any thing, happened to remain of his Property at her death undisposed of by her, then there is no Trust to be administered by this Court. It is true, that in terms his recommendation is, that she shall by her last Will and Testament give and bequeath what she shall die possessed of, under and by virtue of that his Will, in manner therein stated ; and, if these words were uncontrolled by any other part of the Will, it would be to be implied that he had in his view only what she should happen to have left at her death, and not all that he had given to her. But in a prior part of the Will he directs that, upon a second Marriage, whenever that may happen, the whole of the Property which he gives to her, and not such part only as may have been then undisposed of by her, shall be secured to her separate use. A second marriage was at all times possible until her death ; and whenever a second Marriage happened, the whole of his Property was to be secured ; and a power to dispose of any part of the Property absolutely, at any time during her Life, is not to be reconciled to that Provision, when he recommends her to give, in the manner stated, what she should die possessed of under his Will. I must, therefore, consider that he had in view the whole Property which she should possess under his Will ; and that the expression is equivalent to a recommendation to give the whole Property which she should so possess.

Dismiss the Bill without Costs.

1823.

HORWOOD.
v.
WEST.

1823.
3d and 28th
June.

Will. Annuity.

Where an Annuity is given by Will, with a direction that it shall be paid monthly, the first payment is to be made at the end of a Month after the Testator's Death.

HOUGHTON v. FRANKLIN, and Others.

ADMIRAL GRAVES made two Codicils to his Will. In the second Codicil was contained the following bequest :

"I give and bequeath unto *Rebecca Houghton* and her Mother, the sum of 160*l.* per annum, clear of all Expenses; they are to be paid 13*l.* 6*s.* 8*d.* monthly. In case her Mother should die first, the same to be continued to the Daughter; provided that she remains single." The Testator bequeathed the Residue of his Personal Estate to the Defendants, *Maria Franklin* and *Elizabeth Edwards*.

The Bill was filed by *Rebecca Houghton* and her Mother, for the usual Accounts of the Testator's Personal Estate; and to have a sufficient part of the Residue appropriated for securing the Annuity of 160*l.*

In the course of the Cause a question was made as to the time from which the Annuity was to commence; and that question now came on to be argued.

Mr. *Pemberton* for the Defendants :—

An Annuity given by Will does not become payable until the end of a year after the Testator's death. In *Gibson v. Bott* (a), the Lord Chancellor says : " If an Annuity is given, the first payment is paid at the end of the year from the death." The same point came on

(a) 7 Ves. 89.

again before the *Lord Chancellor* in *Fearns v. Young* (b), in which case the *Lord Chancellor* states, that it was not very well settled whether the Tenant for Life was entitled to Interest from the death, or from a year afterwards; but that, at that time, the opinion of several of the *Masters* was, that it was not to be paid until two years. Your *Honor* decided the point in *Stott v. Holdingworth* (c); and from what your *Honor* says in the beginning of your Judgment in *Storer v. Prestage* (d), it must be inferred, that unless there are express Directions for the Commencement of the Annuity, it is not to commence until the end of one year after the Testator's death.

1823.
HOUGHTON.
v.
FRANKLIN
and others.

Mr. *Heald*, and Mr. *Swanston*, for the Plaintiffs:—

There is something in the Report of *Fearns v. Young* which did not fall from the *Lord Chancellor*; for his Lordship is made to say, that an Annuitant is no more than Tenant for Life. But the contrary was decided in *Bayley v. Bishop* (e). There it was held that the direction to lay out 500*l.* in the purchase of an Annuity for the Life of the Testator's Son, was a Gift of the 500*l.*; and that, upon a Bill filed, he might have received the Money, and the Court would not have compelled the Trustees to lay it out in the purchase of an Annuity. The Cases cited on the other side are Cases of Annuities charged upon the Residue; but here the Annuity is prior to the Residue. The expressions of the Will manifest an intention of immediate Payment. The direction that the Annuity is to be paid by monthly Payments, means

(b) 9 Ves. 549. See p. 553.

(c) 3 Madd. 161. (d) *Ibid.* 167.

(e) 9 Ves. 6.

1823.

HOUGHTON
v.
FRANKLIN
and others.

that the Annuitant is to receive the first Payment at the end of the first month after the Testator's death; and it is impossible that the Testator could mean that the first Payment was to be deferred until the end of thirteen months after the Testator's decease.

Mr. *Pemberton*, in reply, said, that there was no difference between an Annuity and a Legacy; for that it was as difficult to provide a Fund for the Payment of an Annuity as it was for the Payment of a Legacy.

The VICE-CHANCELLOR :—

As a Will speaks at the death of a Testator, it must be intended that the Payment of an Annual Sum given by it is to commence from that period, unless there be some circumstances or expression in the Will to control that intention. In this Will there is no such circumstance or expression; and I am, therefore, of opinion, that the Payment of this Annuity ought to commence from the Testator's death.

HOSKINS v. LLOYD.

1823.
6th June.

Practice.
Contempt.

THE Defendant being in Contempt for want of Answer, filed his Answer, but did not get the Order to clear his Contempt. The Plaintiff afterwards moved for the production of Deeds upon an admission in the Answer. And subsequently the Defendant obtained an Order to dismiss the Bill for want of Prosecution.

Where a Defendant is in Contempt for want of an Answer, and afterwards files it, if the Plaintiff acts on the Answer he waves the Contempt, and the Defendant need not obtain an Order to discharge it.

A Motion was now made on the part of the Plaintiff to discharge the Order for dismissing the Bill, on the ground of irregularity, because it had been obtained before the Defendant had obtained an Order to clear his Contempt.

Mr. Agar, for the Motion, cited *Green v. Thomson* (a).

Hughes v. Ball
5 Beav. 140.

Mr. Tinney, for the Defendant, opposed the Motion, and cited *Anon.* (b), *Const v. Ebers* (c), and *Smith v. Blofield* (d), insisting that the Contempt had been waved by the Plaintiff moving upon the Answer. But he offered to submit to the Order now sought, on the terms of the Plaintiff paying all the Costs of the Motion to dismiss the Bill, and of the present Motion.

The VICE-CHANCELLOR:—

A Defendant who puts in his Answer may be discharged of his Contempt, either by the usual Order, or by the waver of the Plaintiff. Here he did not obtain the usual Order; but the Plaintiff, by accepting and acting upon the Answer, waved the Contempt.

(a) Ante, 121.

(c) 1 Madd. 530.

(b) 15 Ves. 174.

(d) 2 V. & B. 100.

1823.
7th June.

*Costs.
Charity.*

Where a Charity Information is filed under 59 Geo. 3, c. 91, without a Relator, the Court has jurisdiction to order the Defendant to pay the Attorney-General his Costs.

THE ATTORNEY GENERAL v. THE EARL OF ASHBURNHAM.

THIS was a Charity Information filed by the *Attorney General*, without naming any Relator, under the 59 G. 3, c. 91, s. 1; and the question was, whether the Court had any Jurisdiction to order the Defendant to pay the *Attorney General* his Costs.

The *Attorney General*, and Mr. Pemberton, for the Crown:—

Where Informations are filed on behalf of Charities, the *Attorney General* sues at the instance of other Parties; and whenever that is the case Costs are given to the Crown; and where the *Attorney General* is Defendant the practice is to make the Plaintiff pay him his Costs. This Act only substituted another remedy for Charities, in lieu of the former, in which the Court could give Costs. If the Court has not that power, every person whose conduct is attacked would defend it, as he would not be liable to Costs. This Act was only intended to apply a new and additional remedy; and, therefore, as it says nothing about Costs, but leaves the conduct and decision of the Suit the same as before, it leaves the discretion as to Costs in the same situation. The rule that the *Attorney General* neither receives nor pays Costs, applies only to Suits respecting any Debt or Interest of the Crown. Here he does not sue for any Interest of the Crown. When the Act says: "that it shall be lawful for the Court to proceed in hearing and deciding the Suit, according to the due course of the Court," it means the due course of the Court in Cases

instituted before the passing of the Act. The principle upon which a Relator is named is not for the purpose of charging the Defendants with Costs, but to enable them to receive Costs. The object of the Act was to prevent any Proceedings being commenced for the purpose of harassing individuals. It would be an extraordinary interpretation to say that this Statute was passed, not to reform Abuses, but to skreen Delinquents from the consequences of misconduct.

1823.
ATTORNEY-
GENERAL
v.
the Earl of
ASHBURNHAM.

Mr. *Wingfield*, for the Trustees.

Mr. *Sugden*, and Mr. *Sidebottom*, for the Defendant:—

The King neither pays nor receives Costs. The reason given for this is, that as it is his Prerogative not to pay them to a Subject, so it is beneath his dignity to receive them (a). The obligation to pay, and the right to receive Costs, must be co-existent; and if the *Attorney General*, as is admitted on the other side, does not pay Costs he cannot be entitled to receive them. The Case mentioned by Mr. *Beames* (b) has been decided, and no Costs were given to the Crown, though it was decided in favour of the Crown. The object of this Act was to allow the *Attorney General* to apply to the Court by Petition; and the other mode was inserted only to prevent its being inferred that the former course was prohibited. But when the *Attorney General* does proceed by Information he must proceed in the same manner as he did before the passing of the Act. No Case can be produced in which the *Attorney General* has received Costs.

(a) 3 Black. Com. 400.

(b) Beames on Costs, 83, note 2.

1823.

ATTORNEY-
GENERAL
v.
the Earl of
ASHBURNHAM.

The *Attorney-General* in reply :—

If collusion is suspected between the Defendants and the Relators, the *Attorney-General* is served with Notices to attend the Inquiries before the *Master* ; he attends by a distinct Solicitor, and always receives his Costs. It does not follow that the Crown cannot receive Costs, because it does not pay them. The practice of introducing Relators was established because as the Crown might receive, but did not pay Costs, there might be some person liable to them. It is every day's practice in the Court of Exchequer for the Crown to receive Costs in cases of Interlocutory Applications, which are refused as being frivolous. In a late Case the Defendant applied for further time to put in a further Answer, and the Court gave the *Attorney-General* his Costs.

The VICE-CHANCELLOR :—

Before the passing of the Statute in question, it was the settled practice of this Court that the *Attorney-General* could not proceed in an Information respecting a Charity, without naming a Relator, who might be answerable in Costs to the Defendants. Upon these Informations in matters of Charity, where the merits of the Case required it, the constant habit of the Court was to subject the Defendant to all the Costs of the Proceeding. And if this new Act, (which, for the purpose of giving additional facilities to Suits of this nature, enables the *Attorney-General* to file his Information without the intervention of a Relator,) should have the effect of relieving the Defendant from Costs to which he was before liable, it would certainly be some surprize upon the intentions of the Legislature. It is said that, although this result may not have been

1843.

ATTORNEY-
GENERAL
v.
the Earl of
ASHBURNHAM.

in the contemplation of the Legislature, it is the necessary consequence of a general principle, that the Crown can neither pay nor receive Costs. I find no such general principle in Courts of Equity. The *Attorney-General* constantly receives Costs, where he is made a Defendant in respect of Legacies given to Charities (c); and, even where he is made a Defendant in respect of the immediate rights of the Crown in cases of Intestacy. And where Charity-Information has been filed by the *Attorney-General*, Costs have been frequently awarded him in interlocutory matters, independently of the Relator. And this supposed general principle which is asserted by the Defendants, is not maintained by any Decision, or by any Dictum, which appears in any reported Case. Collecting the Law of the Court, in this case as in others, from its practice, I am of opinion, that although the *Attorney-General*, suing in discharge of his public duty, could never be made to pay Costs in a Court of Equity, and that he was, therefore, obliged to name a Relator in matters of Charity, yet it is not the rule of a Court of Equity that he can not receive Costs, and that the Defendant must, in this Case, pay his Costs.

It is hardly necessary to notice the reference that has been made to the case of Costs in a Court of Law. In those Courts, Costs, *eo nomine*, were unknown to the common Law, and were recovered only by increased Damages. The Statute of *Gloucester* (d), which first gave Costs expressly, did not extend to the King, because he was not specially named; but it was expressly provided by the 33d H. 8, c. 9, that the King shall recover his Debt with Costs.

(c) See *Moggridge v. Thackwell*, 7 Ves. 88.

(d) 6 Edw. 1, c. 1.

1823.
10th June.

GREEN and Others v. FOLGHAM and Others.

The sole Possessor of a Recipe for making a Medicine, assigned it, on the Marriage of his Daughter, to Trustees, in Trust for her and her Husband, for their Lives; and directed that after their Decease it should be sold for the benefit of their Children. The Mother destroyed the Recipe, and verbally communicated the contents to her eldest Son, for the benefit of his Brothers and Sisters. Upon a Bill filed against him by some of the younger Children, he was declared to hold the Secret upon the Trusts of the Settlement, and was decreed to account for the Profits made by him by the Sale of the Medicine after his Mother's death; and, as a Sale was impracticable, an Issue was directed to ascertain the Value of the Secret.

IN 1791 *William Singleton* was possessed of a Recipe for making an Ointment called "*Dr. Johnson's Ointment for the Eyes*," the contents of which were known only to himself; and in the month of September in that year, upon the treaty for the Marriage of his Daughter *Selina* with *Timothy Folgham*, it was agreed that the Ownership of the Ointment, and the Recipe, should be settled, after the decease of *Singleton* and his Wife, for the benefit of *Folgham* and his intended Wife, and their Issue, in the manner after mentioned. Accordingly, by an Indenture dated the 12th of September 1794, and made between Mr. and Mrs. *Singleton* of the first part, Mr. and Mrs. *Folgham* of the second part, and three Trustees, of whom the Defendant *Church* was the Survivor, of the third part, in pursuance of the Agreement, and in consideration of the Marriage which had then lately taken place, *Singleton* assigned to the Trustees the Proprietorship of the Medicine, upon Trust for *Singleton* and his Wife, during their Lives, and the Life of the Survivor of them; and after the Survivor's decease, upon Trust for *Selina Folgham*, for her Life, for her separate use; and after her decease, upon Trust for *Folgham* for his Life; and it was declared, that if at the decease of the Survivor of these four persons there should be more than one Child of *Folgham* and his Wife, the Trustees should sell the Ownership of the Ointment, and the Money arising from the Sale should be laid out by the Trustees in their

1823.

GREEN
and others
v.
FOLGHAM
and others.

Names, on Government or Real Securities, for the benefit of such Children, in equal Shares, and to be transferred to them at the usual periods. And Mr. and Mrs. *Folgham* covenanted, that if any of their Children should survive them, they should discover to one or more of them the method of making the Ointment.

Mr. *Singleton* survived his Wife and Mr. *Folgham*; and on his death the Recipe was delivered to Mrs. *Folgham*. She, assisted by the Defendant, *William Singleton Folgham*, one of her Sons, made and vended the Ointment until about six months before her death; when, having previously communicated to him verbally the Secret of making the Ointment, she retired into the Country, and left him in the entire management of the Concern. In Jan. 1816 Mrs. *Folgham* died, leaving Issue the Plaintiff, *Selina Elizabeth Green*, (who afterwards married the Plaintiff *Stephen Green*), the Defendant *William Singleton Folgham*, and three other Children, all of whom were then Infants. The Recipe was not found after Mrs. *Folgham*'s death, and it was therefore believed that she had destroyed it. In March 1816, *William Singleton Folgham* came of Age; when *Church*, the surviving Trustee, conceiving that it would be more beneficial to the Parties interested, that *W. S. Folgham* should make up and vend the Ointment according to his Mother's instructions, for the benefit of himself and his Brothers and Sisters, than that the Secret should be sold, an Indenture, dated the 22d day of June 1816, was made between *W. S. Folgham* of the one part, and *Church*, and one *Hall*, of the other part; by which, after reciting that the Secret of making the Ointment had been communicated to *W. S. Folgham* by his Mother, for the benefit of himself and his Brothers and Sisters, *W. S. Folgham* covenanted to make up and sell

1823.

GREEN
and others
v.
FOLGHAM
and others.

the Ointment, and twice in every year to pay to *Church* and *Hall* four fifths of the clear profits, after deducting 25*l.* per cent. yearly from the gross Amount of the Sales, for his trouble. And it was declared that *Church* and *Hall* should stand possessed of the four fifths of the Profits, in Trust for Mr. and Mrs. *Folgham's* other Children.

W. S. Folgham made up and sold the Ointment, and disposed of the Profits according to the Provisions of this Deed. In March 1817, Mrs. *Green* came of Age; and on the 17th of September in that year, she, at *W. S. Folgham's* request, signed an Agreement to transfer to him all her Interest in the Ointment, in consideration of his paying an Annuity of 100*l.* to her, and to the Plaintiff *Stephen Green* (to whom she was then about to be married) for their Lives; and on the 22d of the same month she also, at *W. S. Folgham's* request, executed a Deed-Poll confirming the Indenture of the 22d of June 1816.

The Bill did not take any notice of the recital before mentioned in the Indenture of June 1816; but it charged that the Provisions made by that Indenture for the Plaintiff Mrs. *Green*, and the other younger Children whilst they were under Age, was very disadvantageous to them: That *Church* and *Hall* acted in concert together, and had imposed upon them in respect of the Provisions of that Deed: That Mrs. *Green* was imposed upon by *W. S. Folgham* in respect of the Deed-Poll of September 1817: That she was ignorant of its contents when she executed it: That it was obtained from her by Fraud: That the Annuity of 100*l.* a year was a grossly inadequate Consideration for the Share of the Profits of the Ointment to which she was

entitled under the Settlement: That *W. S. Folgham* held the Proprietorship of the Ointment subject to the Trusts of the Settlement: That those Trusts ought to be performed, and the Ownership of the Ointment sold, as directed by that Instrument.

1823.

GREEN
and others
v.

FOLGHAM
and others.

The Bill prayed, that the Deeds of June 1816, and September 1817, and the Agreement, might be declared fraudulent and void, and be delivered up to be cancelled: That the Trusts of the Settlement of September 1794 might be performed: That an Account might be taken of the quantities of the Ointment sold since Mrs. *Folgham's* death, and of the Monies produced by the Sale: That one fifth of the Profits might be paid to the Trustees of Mr. and Mrs. *Green's* Marriage Settlement, and three fifths be placed out at Interest for the benefit of the three other younger Children: That the Ownership of the Ointment might be sold, and the Proceeds applied according to the Trusts of the Settlement; and that *W. S. Folgham* might be restrained from divulging the method of preparing the Ointment.

W. S. Folgham, by his Answer, said, that the existence of the Settlement was not known to him until long after he had been in possession of the Secret of preparing the Ointment: That his Mother communicated the Secret to him without imposing any Conditions on him, or stating that any other person was to partake of the Profits of the Ointment; and he submitted whether, under these circumstances, his Brothers and Sisters took any Interest in the Ownership of the Ointment under the Trusts of the Settlement, and whether he was bound by the Provisions thereof. He admitted that he came of Age on the 20th. of March 1816; and that,

1823.

GREEN
and others

v.

FOLGHAM
and others.

having become acquainted with the contents of the Settlement, he was desirous that his Brothers and Sisters should partake of the Profits of the Ointment; and that he accordingly executed the Indenture of June 1816; and he submitted that that Deed, having been made for the interest of all the Infants, ought not to be disturbed. He said that he had devoted his whole time and attention to the conduct of the Business, and was brought up with the full expectation of having the Profits for his Provision; and that, in order to assist his Mother in the Business, he had given up a Situation which he had filled for five years; and that, in the course of conducting the Business, he had been obliged to forego many advantageous opportunities of Advancement in other pursuits; and he denied all the Allegations in the Bill as to the Deed-Poll and Agreement having been obtained from Mrs. *Green* by fraud or surprise, and as to the Annuity of 100*l.* being an inadequate Consideration for her share of the Profits of the Ointment.

The Cause now came on to be heard on the Bill and Answer.

Mr. *Hart*, and Mr. *Girdlestone*, for the Plaintiffs :—

The communication of the Secret by the Mother to the Defendant *W. S. Folgham* was a Breach of Trust; and, as he gave no Consideration for the Secret, he must be considered as holding it subject to the Trusts of the Settlement. At all events he is precluded, by the recital in the Indenture of June 1816, from saying that the Secret was disclosed to him for his own benefit. It is impossible that the Deed of 1816 can be supported, as the Trustees had no authority to make the Arrangement which it was the object of that Deed to carry into effect.

Mr. *Horne*, and Mr. *Knight*, for the Defendant
W. S. Folgham:—

1823.

GREEN
and others
v.
FOLGHAM
and others.

The Argument in this Case divides itself into two Heads: first, whether this Secret is Property on which the Court can act; and, secondly, whether it was not communicated under such circumstances as to prevent the Court from acting, except under the Deed of 1816, by which *W. S. Folgham* is willing to be bound.

1st. This is a mere verbal Secret: it was never committed to writing. Now can the Court perform a Trust which is fastened upon a Substance so shadowy as this? It never can be ascertained whether the Secret disclosed is or is not the real Secret. There can be no Property in a subject of this nature. *Newbery v. James (a)*, *Williams v. Williams (b)*. Nor is even the exclusive enjoyment of it protected by Patent. No such relief as is sought by the Bill can be granted; for the Plaintiffs, in fact, pray for a specific performance of the original Settlement.

2d. This Secret, which the Parties attempted to make the subject of a Settlement, is revealed to a Person ignorant of the Trusts of that Settlement; and the question is, whether a Person coming to the knowledge of a Secret under such circumstances does not take it in such a manner as not to subject him to any Trust? The question whether he is a Trustee, does not depend upon his being the depositary of the Secret; but whether it was revealed to him under such circumstances as, if a Bill had been filed against him, he would have been declared a Trustee. The communication was

(a) 2 Mer. 446.

(b) 3 Mer. 157. But see *Yovatt v. Winyard*, 1 J. & W. 394; and *Bryson v. Whithead*, ante 74.

1823.

GREEN
and others
v.FOLGHAM
and others.

made to him by his Mother, under no Trust. He made no promise, at the time, that he would hold it for the benefit of his Brothers and Sisters. If the Secret was originally disclosed without any Trust, can this Court now affect his Conscience? Unless he originally took it as a Trustee, nothing that occurred subsequently can make him a Trustee. When the Settlement was discovered no new Equity arose. Because it was a breach of trust in the Mother to disclose the art of making this Ointment, it does not follow that a Trust was fixed on the Person to whom it was disclosed. Suppose this Defendant had communicated the Secret to another Person, it would not have been a breach of trust in him, and he could not have been restrained from revealing it; and if he could not have been restrained from revealing it, what is there in this Court to compel him to reveal it for the benefit of the Plaintiffs? Besides, *W. S. Folgham* did give a valuable Consideration for the Secret; for he swears, in his Answer, that he gave up a very lucrative situation for it. We then come to the Deed of 1816: *W. S. Folgham* submits to it, and is willing to be bound by it. But the Plaintiffs, at one time, repudiate that Deed, and, at another, insist upon it, and claim the benefit of the recital. But as Admissions made pending a Compromise are not the subjects of Evidence, so an Admission made upon a Family Agreement cannot be taken advantage of against the Party making it. Can a Party who seeks to set aside a Deed of Family Compromise take advantage of such an admission as an Estoppel, and then set aside the Deed upon which that Estoppel arises? He cannot destroy the Deed, and then take advantage of it. Besides, the facts stated on the Record contradict that recital; and if the Plaintiffs had not set their Cause down on Bill and Answer, but had filed a Replication,

we could have produced Evidence to explain away that recital, which we are now precluded from doing by their not adopting that course. What benefit will they derive from avoiding the Deed? For if the Deed is declared void, their situation will be the same it was before the Deed was executed.

1823.

GREEN
and others
v.
FOLGHAM
and others.

Mr. *Merivale*, for the Defendant, *Maria Folgham* :—

The arrangement made by the Deed in 1816 was extremely beneficial to my Client, and her interests will be greatly prejudiced if that Deed is set aside. The Decree sought by this Bill is one which the Court could not enforce. The Bill prays that the Ownership of this Ointment may be sold. Now, supposing the Court were to decree a Sale, how could it enforce it? What are the acts which *W. S. Folgham* is to do, in order to give effect to the Sale; and how is the Court to compel him to do those acts? The *Lord Chancellor* has decided that it is impossible to enforce the Negative(c), and it is much more difficult to enforce the Affirmative.

Mr. *Bell*, and Mr. *Pepys*, for the Trustees.

The VICE-CHANCELLOR :—

It was stated, at the Bar, that the Defendant, *W. S. Folgham*, was a Purchaser of this Secret for a valuable Consideration, without notice of the Settlement; but no such case is made in his Answer. And, after the admission made by him in his Answer that he voluntarily considered himself as a Trustee for the Marriage Settlement, and after the execution of the Deed of

(c) In *Newbery v. James*, and *Williams v. Williams*, before cited.

1823.

GREEN
and others
v.
FOLGHAM
and others.

June 1816, which is not impeached, he cannot successfully assert a personal Title to this Secret.

By the terms of the Marriage Settlement the Trustees were directed to sell this Secret upon the death of *Selina Folgham*; and, having no authority to deal with this subject as they have in fact dealt with it by the Deed of June 1816, that Deed is merely void against the younger Children, who were all then Infants. The subsequent Agreement of September 1817, by which *Selina Green* engaged to assign her Interest in the Secret to the Defendant for the Annuity therein stated, being abandoned at the Bar, is now out of the question. The Defendant, *W. S. Folgham*, being to be considered therefore as a Trustee of this Secret under the Settlement, the first relief to which the Plaintiffs are entitled is, that he should come to an Account for the Profits actually made by him since the death of his Mother, from the Sale of the Ointment, having a reasonable Allowance made to him for his time and trouble in preparing and vending the same. If this Secret could be made a subject of Sale, the Plaintiffs would be next entitled to ask from the Court that a Sale should be directed accordingly. But, inasmuch as the Court has no possible means either to communicate this Secret to a Purchaser with certainty, or to protect him in the enjoyment of it, a Sale becomes impracticable. But although the Court can not direct a Sale, it has the power of taking a course which, in point of advantage, will be equivalent to the Plaintiffs. It can inquire what would be the Value of this Secret to sell, provided it could be made the subject of Sale; and the Annual Profits which have actually been made by the Sale of the Ointment from the death of the Mother will be a fair criterion by which that Value may be estimated.

I think that this Value is more fit for the consideration of a Jury than of the *Master*; and, after decreeing the Account of the Profits from the death of the Mother, in the manner which I have stated, I shall direct the Parties to proceed to an Issue at Law, in order to try what, at the date of this Decree, was the pecuniary Value of the Secret for the preparation of the Ointment in the Pleadings mentioned, called, "Dr. Johnson's Ointment for the Eyes, or the Golden Ointment." The circumstances, that the Plaintiff *Selina Green's* Interest in the Secret is made the subject of her Marriage Settlement, and that one or more of Mrs. *Folgham's* Children are still Infants, are not material for present consideration.

Let further Directions and Costs be reserved.

1823.

GREEN
and others
v.
FOLGHAM
and others.

DECREE IN GREEN v. FOLGHAM.

This Court doth order and decree, That it be referred to Mr. *Cross*, one of the Masters of this Court, to take an Account of the Money received by the Defendant, *W. S. Folgham*, or by any Person or Persons by his order, or for his use, in respect of the Sales of the Ointment, or medical Preparation, called, &c. since the death of *Selina Folgham*, in the Pleadings named; and also an Account of his charges and expenses in the Preparation and Sale of the said Ointment; and in taking the said Account the *Master* is to consider what would be a reasonable compensation to the Defendant, *W. S. Folgham*, in respect of the Preparation and Sale of the said Ointment: And it is ordered, that the said *Master* do take an Account of the Payments which have been made by the said *W. S. Folgham* to or for the use of his Brothers and Sisters respectively, since the death of the said *Selina Folgham*; and for the better taking such Accounts, the Parties are to produce, upon oath, all books, papers, &c. and are to be examined on interrogatories, &c.: And it is ordered, that the Parties do proceed to a Trial at Law in His Majesty's Court of Common Pleas, at the sittings after next Michaelmas Term, on an Issue to try what is, on the 28th day of June 1823, the Value to the Defendant, *W. S. Folgham*, of the Recipe for, or the art or method of preparing the said Ointment; and in such Issue the said Plaintiffs are to be the

1822.

GREEN
v.
FOLGHAM.

1822.

GREEN

v.

FOLGHAM.

Plaintiffs at Law, and the said *W. S. Folgham* is to be Defendant at Law, who is forthwith to name an Attorney, accept a Declaration, appear and plead to Issue: And it is ordered, that the said *Master* do settle the Issue in case the Parties differ. And this Court doth reserve the consideration of all further Directions, and of the Costs of this Suit, until after the said *Master* shall have made his Report, and the Trial of the said Issue; and any of the Parties are to be at liberty to apply to this Court as there shall be occasion.

Reg. Lib. 1822, A. fol. 2338.

1823.

11th June.

Jurisdiction.

A general Demurrer to a Bill by the Assignees of a Bankrupt, to restrain an Action by him to try the validity of the Commission, allowed.

KIRKPATRICK and Another v. DENNETT.

THE Defendant had been found a Bankrupt under a Commission issued in October 1810. The Plaintiffs were his Assignees. The question was, whether the filing of a Bill for an Injunction was the proper course to be adopted by them to prevent the Bankrupt from proceeding in an Action which he had commenced in order to try the validity of his Commission.

The Defendant had submitted to the Commission, and obtained his Certificate in January 1819. He took no step to impeach it until he brought the Action. But, in April 1819, the Defendant's Son, in collusion, as the Bill alleged, with the Defendant, presented a Petition for the purpose of superseding the Commission, on the following grounds: that the petitioning Creditor's Debt was usurious: that the Commission was obtained by collusion between the Defendant and the petitioning Creditor; and that there was no evidence of an Act of Bankruptcy. On the 27th April 1819 this Petition was dismissed.

The Plaintiffs had entered into several Contracts for the Sale of the Bankrupt's Estates. But these Contracts

were not completed, in consequence, as the Bill stated, of his having declared his intention of disputing the Commission; and, in Trinity Term 1822, an Action was brought by him against the Plaintiffs for that purpose.

1823.
KIRKPATRICK
and another
v.
DENNETT.

The Bill, after stating these facts, prayed that it might be declared that the Defendant had submitted to and acknowledged the validity of the Commission; and that he might be perpetually enjoined from proceeding in the Action, and from all other Proceedings to impeach or supersede the Commission.

To this Bill the Defendant filed a Demurrer for want of Equity.

Mr. *Treslove*, for the Defendant:—

The Case of *Flower v. Herbert* (a) is the only one in which a Bill like this has been entertained. I have looked at that Case in the Registrar's Book, and I find that the Bankrupt had there delayed to bring his Action until the Assignees were about to declare a Dividend. That is not the case here; for these Plaintiffs have done nothing under the Commission. There too the petitioning Creditor's Debt arose on Account; and Lord *Hardwicke* said, that he did not know how it could be determined without taking that Account, which could not be taken in an Action at Law; and he granted the Injunction till the hearing of the Cause. The difference between that Case and this is, that the Petition in 1819 represented the Commission as founded on a usurious Debt, and that the Assignees have advertised the Estate for Sale in Lots, and entered into Contracts for Sale; and that those Contracts are not completed

(a) 2 Vez. 326.

1821.

KIRKPATRICK
and another

v.

DENNETT.

an account of the Bankrupt disputing the Commission. Therefore it is quite evident that those questions must be decided at Law. Here the Action was brought in Trinity Term 1822, and the Plaintiffs have waited until the Defendant was on the point of trying it, and then they have filed this Bill. This is not a Case in which the Court, even if it has Jurisdiction, ought to interfere under the authority of the Case decided by Lord *Hardwicke*. But the Court has no Jurisdiction to interfere in this Case. The proper course would have been for the Plaintiffs to present a Petition, and not to have taken a course which is attended with great delay and expense.

Mr. Bell, and *Mr. Wakefield*, for the Plaintiffs:—

The question is not so much whether this Bill can be maintained, as whether, if a Bankrupt avails himself of the benefit of his Commission, and takes his Certificate, and protects himself under it, and thereby adopts it, he can be allowed to bring an Action at Law to dispute the Commission. The objection to this Bill is founded on the want of Jurisdiction in this Court to entertain this Suit, and not on any ground of Equity. That objection cannot be taken by way of general Demurrer.

The VICE-CHANCELLOR:—

The Bill does not allege that the Commission is a valid one, or that the Bankrupt brings the Action only with a view to harass his Assignees. The sole ground on which the Bill rests is, that the Bankrupt has obtained his Certificate; and the question raised upon the Bill is, whether that is a sufficient reason for restraining a Bankrupt from all proceeding to dispute his Commission, whatever may be the nature of his objection, or however late he may have discovered it.

The objection as to the Jurisdiction was not taken in the Case referred to. The proper and familiar course to obtain the object of this Suit is by Petition; and if this Bill would lie, a Bill in the Court of Exchequer would also lie; and Bankruptcy would thus come indirectly to be administered in that Court.

1823.

KIRKPATRICK
and another
v.
DENNETT.

Independently, however, of the question of Jurisdiction, I shall allow this Demurrer, upon the ground that the Bill does not state a Case which entitles the Assignees to the Injunction.

DAVIS v. GETTY and Others.

THE Plaintiff, and the Defendant *Mary Getty*, having disputes with each other, agreed that they should be referred to Arbitration, and that the Submission should be made a Rule of the Court of Common Pleas if either Party required it. The Award made in pursuance of this Agreement directed the Plaintiff to pay a certain sum of Money to the Defendant; but neither the Submission nor the Award was made a Rule of Court.

1823.
13th and 28th
June.

Award.

The object of the Bill was to prevent the Defendant from availing herself of the Award: and, upon a Motion, made by the Plaintiff, to restrain a Proceeding taken by the Defendant with that view,

Where it is one of the terms of an Agreement to refer disputes to Arbitration, that the Submission shall be made a Rule of a Court of common Law if either Party require it, this Court has no jurisdiction to relieve against the Award, although the Submission has not been made a Rule of the Court of common

Mr. *Agar*, and Mr. *Duckworth*, for the Defendant, objected, that, as it had been agreed between the Parties that the Submission to Arbitration should be made a Rule of the Court of Common Pleas, this Court had

Law within the time limited by the Statute.

1823.

DAVIS
v.
GETTY
and others.

no Jurisdiction to relieve the Plaintiff from the effect of the Award.

Mr. Hart, and Mr. Garratt, for the Plaintiff:—

This Court is not deprived of its Jurisdiction over the subject-matter of this Suit; for the Submission to Arbitration has never been made a Rule of the Court of Common Pleas. It is plain, from the language of the 1st sect. of 9th and 10th W. 3, c. 15, that the Legislature did not mean to transfer the jurisdiction over Awards. It only meant to give either Party the privilege of making it a Rule of Court if he pleased; not to compel him to do so; but to leave him at liberty to enforce the Award by an Action, if he preferred that course. In *Gwinnett v. Bannister* (a), the Submission had actually been made a Rule of a Court of Law. In *Steff v. Andrews* (b), the Vice-Chancellor observes: "If made a Rule of Court, this Court could not act. The Jurisdiction would be transferred to the Court in which the Submission was made a Rule. But if the Submission is not acted upon, no other Court acquires Jurisdiction, for no process of Contempt lies. It is the same as if no such Submission had been made." And his Honor therefore overruled the Plea. That Case is completely in point. *Goodman v. Sayers* (c) gives countenance to the same principle. For if the Master of the Rolls had thought that he had no Jurisdiction, he would not have entered into the facts of the Case in delivering his Judgment. If a Party does not choose to enforce the Award by Attachment, but brings an Action, he will not afterwards be allowed to wave his Action, and proceed by Attachment (d). Therefore as the Defendant

(a) 14 Ves. 539.

(b) 2 Madd. 6.

(c) 2 J. & W. 249.

(d) *Badley v. Loveday*, 1 Bos. & Pull. 81.

has taken a proceeding to enforce the Award, she has abandoned the Jurisdiction, and can no longer make the Submission a Rule of Court. Suppose a reference was obtained by Fraud, and that an Award was made, and an Action brought upon it, and that the Defendant pleaded the Fraud, (which would give him a legal defence to the Action,) would a Court of Equity say that he could not come to it for a discovery as to the Fraud? The language of the Act is not that no other Court shall have Jurisdiction, but that no other Court shall stop the process.

1823.
DAVIS
v.
GETTY
and others.

The construction which the *Lord Chancellor* has put upon the last Section of this Act is, that no other Court shall set aside the Award except that of which the Submission is made a Rule (c). So that the whole purview of the Act looks to its being made a Rule of Court. The effect of the Statute is, that if the Submission is made a Rule of Court, then that Court obtains the Jurisdiction, which is given it by the second Section, to set the Award aside, and also the Jurisdiction given it by the first Section to enforce the Award. We submit, therefore, upon the language of the Act, and upon the Authorities which have been cited, and particularly *Steff v. Andrews*, that, as this Award has not been made, and cannot now be made a Rule of Court by the other Party, we have a right to apply to this Court for relief.

The VICE-CHANCELLOR:—

The Statute of W. 3, for determining differences by Arbitration, had two objects: first, to give the Parties the process of Contempt for enforcing the Award; an next, to make Awards final, unless complaint was made

1823.

DAVIS
v.
GETTY
and others.

within a limited time, in that Court to which the Parties had agreed to give jurisdiction, by consenting that the Submission should be made a Rule of it. The Statute limits no time within which the Party who seeks to *enforce* the Award is to make his application to the Court for that purpose; but the Party who seeks to *set aside* the Award is to make his Application to the Court before the last day of the next Term after the Award is made. The Court, however, has no jurisdiction either to enforce the Award or to set it aside, until the Submission be actually made a Rule of the Court. Either Party may make the Submission a Rule of the Court, and may obtain the aid of the Court, either to enforce or avoid the Award, by taking, in due time, that preliminary step. The argument for the Plaintiff admits that, if he had taken that preliminary step in due time, this Court would have had no jurisdiction. But it is contended for him that, because he failed to take that step, not only is the jurisdiction transferred to this Court, but he is relieved from all limitation as to the time within which he is to make his complaint against the Award. I can not consider that it was the intention of the Legislature to leave it to a Party who meant to complain of the Award to escape, at his pleasure, from the provisions of the Statute. I consider it to be the duty of a Party who means to complain of the Award, to make the Submission a Rule, so as to give the proper Court jurisdiction; and that, if he fail to do this in due time, he can not, by his own default, create a new jurisdiction in this Court, and defeat the limitation of time fixed by the Statute.

*See 1846 on Tithes 115
S.C. 3 Rep. 525*

WILLIAMS v. BACON and Others.

1823.
13th June.

THE Bill was filed by the Rector of the Parish of *Markfield*, against the Occupiers of certain Lands in that Parish, and against *Charles March Phillips*, Esq. and it prayed for an Account, and Payment of the Tithes of those Lands.

Tithes.

The Occupiers in their Answer stated, that the Lordship of *Markfield* consisted partly of ancient inclosed Lands, consisting of 116 Acres, or thereabouts, lying together, and called and well known by the name of the *Cliff Slade*. They then set forth the boundaries of these 116 Acres, and added that, during the several years mentioned in the Bill, the Occupiers of the Lands called the *Cliff Slade* had paid to the Defendant *Phillips* the yearly sum of 4*s.* 10*d.* and that the same had been accepted by him in lieu of the Tithes of those Lands.

At the Trial of an Issue to ascertain whether one of the Defendants, a Layman, was entitled to the Tithes, or a Modus in lieu of the Tithes, of certain Lands, it was proved that a Payment, described as a Tithe or Rate-tithe, issuing out of the Lands in question, had been conveyed by the Defendant's Title-deeds for the last 150 years, and that this Payment had been received by him and his Ancestors, and that no Tithe had been paid to the Plaintiff, the Rector, within living memory; and a Verdict was found for the Defendant.

The Defendant *Phillips*, by his Answer, claimed the Tithes in Kind of the Lands in question, or a Modus, Composition, Rate-tithe, or Annual Payment of 4*s.* 10*d.* in lieu thereof; and he said, that the said portion of Tithes, Modus, Composition, Rate-tithe, or Annual Payment, had been, for a great length of time, the subject of Conveyances and Assurances in the Law as a Lay Fee; and that the Persons from whom he derived his Title to it had, for 140 years and upwards, received the Tithes of the Lands called the *Cliff Slade*, or accepted a Composition, Rate-tithe, or Yearly Sum, in lieu and satisfaction thereof.

A Motion for a new Trial by the Rector, was refused.

1823.

WILLIAMS
v.
BACON
and others.

At the hearing of the Cause, the following Issue was directed to be tried at the next Assizes: "Whether the Defendant, *C. M. Phillipps*, was entitled to the Tithes, or to a Modus of 4s. 10d. payable yearly in lieu of Tithes, of the Lands called the *Cliff Slade*?"

At the Trial of the Issue Mr. *Phillipps* produced his Title-deeds for the last 150 years, by some of which was conveyed, "All that Rate-tithe of 4s. yearly renewing, increasing and arising out of certain Grounds in *Markfield*, called the *Cliffe Slade*;" in others, "The Tithes or Rate-tithes of 4s. 8d. yearly issuing out of the Closes called the *Cliffe Slade*, in the Parish of *Markfield*;" and in others, "The Tithes or Rate-tithes of 4s. 10d. issuing and payable out of sundry Closes called *Cliff Slades*, situate and being in *Markfield* aforesaid." It was also proved that, as far as living memory could reach, this Payment had been received by Mr. *Phillipps* and his Ancestors, and that no Tithes had been paid to the Rector for the Lands in question. Upon this evidence the Jury found a Verdict for the Defendants in this Court, who were Plaintiffs in the Court of Law.

Mr. *Bell*, and Mr. *Treslove*, for the Plaintiff, now moved for a new Trial.

The question is, whether, in the case of an Ecclesiastical Rector, a Court ought, upon such Evidence as was given at the Trial of this Issue, to direct a Jury to find in favour of the Defendants; or whether there ought not first to be some evidence of the existence of such a portion of Tithes, and how it became separated from the Rectory? Until the dissolution of Monasteries no Layman could hold Tithes. When the Monasteries were dissolved the Crown was enabled to grant out

1823.

WILLIAMS
v.
BACON
and others.

Tithes to any individual. But it must be shown that this pension was existing at that time, and also how it became separated from the Monastery. Evidence ought to have been given of the commencement of this Payment, as is required in the case of a Composition real. The Defendants did not make any attempt to show the origin of their Title; they only showed a dry Possession for 140 years. The introduction of this Payment into the Title-deeds can not prejudice the Rector; for he had no access to them. Admitting that where Tithes have been the subject of conveyance and enjoyment for a great length of time, a Title would be presumed against a Lay Impropiator, the same circumstances would not induce the Court to make the same presumption against an Ecclesiastical Rector: for a Lay Impropiator may alienate, but a Spiritual Rector cannot; and the Courts look with great jealousy upon any usurpation of the Rights of the Church. *Strutt v. Baker* (a), *Scott v. Airey* (b), *Fanshaw v. Rotherham* (c), *Berney v. Harvey* (d), and *Meade v. Norbury* (e).

Mr. *Heald*, and Mr. *Merivale*, for the Defendants.

The VICE-CHANCELLOR:—

• This Case cannot be confounded with a prescription *in non decimando*, which is merely unlawful. The Defendant here claims a portion of Tithes to which he may be legally entitled; and the single consideration is, whether there was sufficient Evidence before the Jury

(a) 2 Ves. jun. 625. Gwill. 1430.

(b) Gwill. 1174.

(c) Ibid. 1177, and 1 Eden, 276. See particularly pp. 296 and 297.

(d) 17 Ves. 119.

(e) 2 Price, 338, and in D. P. 9th April 1821.

1823.

WILLIAMS

v.

BACON
and others.

to justify their presumption that he had such legal Title.

It is proved, by existing Deeds, that this portion of Tithes has been the regular subject of Conveyance for one hundred and fifty years past; and that the actual perception of Tithes, or of a Money Payment in lieu of Tithes, has accompanied the Title by Conveyance as far back as living Testimony can reach; and, unless it be peculiar to this species of Property that the origin of the Title must be actually shown, no Evidence can be more conclusive. It is argued, that this would be good Evidence against a Lay Rector, according to the Case of *Scott v. Airey*, and the other Cases referred to; but that it is not sufficient Evidence against the Plaintiff, who is a Spiritual Rector. I cannot very well reach the Principle of this distinction. A legal Title to a portion of Tithes may exist as well against a Spiritual Rector as against a Lay Impropiator; and why, therefore, is not such a Title to be presumed from long Conveyance and Possession? It is true that a Lay Impropiator may himself sever a portion of Tithes, which a Spiritual Rector cannot do; and that a presumption may therefore be raised against a Lay Impropiator upon slighter Evidence than would be reasonable against a Spiritual Rector. But this does not affect the Principle. If it were necessary, in the Case of a Spiritual Rector, to show the actual origin of a portion of Tithes, it is not probable that any such portion could at this day be maintained.

Refuse the Motion for a new Trial, with Costs.

BARNEY v. LUCKETT.

1823.
14th June.

MR. PARKER, for the Plaintiff, moved, on the coming in of the Answer, that the Defendant, might be restrained, by the Injunction of the Court, from setting up a term of one thousand years created in the Estate in question in this Cause, in defence of the Action of Ejectment brought by the Plaintiff for the purpose of trying his Title to the Estate.

Injunction.

An Injunction to restrain the setting up of an outstanding Term in bar of an Ejectment, will not be granted upon Motion.

The Plaintiff, by his Bill, claimed to be entitled to an Estate in *Norfolk*, as Heir at Law of one *James Moore*.

Mr. Sidebottom, for the Defendant:—

The Plaintiff has not shown himself to be the Heir of *J. Moore*; and therefore if this Motion is granted, the Court may interfere on behalf of a person who has no Title to this Estate. How can any person proceed in this summary way in a Court of Equity without having made out his Title?

This is a Bill for relief; and in *Leighton v. Leighton* (a), a Decree was made upon such a Bill. In *Hylton v. Morgan* (b), a Motion similar to the present one was refused; and in *Aston v. Lord Exeter* (c), the Court refused to Order, upon Motion, even Deeds to be produced in aid of an Ejectment.

Mr. Parker, in reply:—

In the Cases referred to, the Bills were Bills for relief. I seek no relief. The Bill, in this Case, does

(a) 1 P. W. 671. (b) 6 Ves. 293. (c) Ibid. 288.

1823.

BARNEY

v.

LUCKETT.

not pray for any Account, or for the delivery of Possession of the Premises to the Plaintiff, but merely for the Injunction (d).

(d) His Honor delivered Judgment upon this Motion, and upon the Motion in *Northey v. Pearce*, post, at the same time.

1823.

6th and 28th

June.

Injunction.

NORTHEY v. PEARCE and Others.

IN this Cause a Motion was made by Mr. Knight, for the Plaintiff, similar to that made in the preceding Case.

An Injunction to restrain the setting up of outstanding Terms in bar of an Ejectment, will not be granted upon Motion.

The Plaintiff claimed the Estates in question in the Cause as Heir of one *Mary Row*. The Bill prayed for an Account of those Estates, and of the Rents and Profits received by the Defendants; for Injunctions to restrain the cutting of Timber, and the setting up of outstanding Terms; to have the Title Deeds delivered up to the Plaintiff; and for liberty to examine certain old persons as Witnesses at the Trial of the Ejectment which the Plaintiff had commenced to recover Possession of the Estates. The Defendants admitted in their Answer that there was a term of nine hundred years in part of the Estates vested in a Trustee to attend the Inheritance.

Mr. Knight, for the Plaintiff, cited *Leighton v. Leighton* (a).

Mr. Beames, contra, cited *Hylton v. Morgan* (b), and *Byrne v. Byrne* (c).

(a) 1 P. W. 671. (b) 6 Ves. 293. (c) 2 Scho. & Lef. 537.

The VICE-CHANCELLOR:—

These are Bills to aid Trials at Law by Equitable Relief; and the question is, whether the Court is to grant this Relief upon Motion. It is obvious that it may appear, at the hearing, that there are circumstances which entitle the Defendants also to Equitable assistance in the Trials at Law. There may be Cases for Issues, or Special Admissions may be required from the Plaintiffs. These Applications by Motion are equally against Principle and Authority.

Refuse both Motions, with Costs.

1823.

NORTHEY
v.
PEARCE
and others.

WATTS v. MANNING.

1823.

14th June.

THE Court was moved, on behalf of two of the Defendants, that it might be referred to the *Master* to tax those Defendants their full Costs and Charges, as between Solicitor and Client, of the several Amendments made by the Plaintiffs of their Bill in this Cause; that such Costs, when taxed, might be forthwith paid by the Plaintiffs, or their Solicitors; and that in the mean time all Proceedings might be stayed.

Practice.
Extra Costs of
Amendments.

Where a Bill had been amended three times, and the two last Amendments were made necessary by the negligence or error of the Plaintiffs, the Defendant was allowed extra Costs for those Amendments.

The Affidavit in support of the Motion was to the following effect: The original Bill, consisting of four hundred and seventeen folios, was filed in April 1816; the Answers of all the Defendants except one, who was out of the Jurisdiction of the Court, were put in in that year; in June 1817 the Plaintiffs replied to the Bill; and shortly after the 30th of July following amended their Bill; in May 1819 the Plaintiffs again amended the Bill, by filing a new Ingrossment containing four hun-

1823.

WATTS
v.
MANNING.

dred and thirty folios; in November following they again filed a Replication, without waiting for any Answer. Under an Order obtained in July 1822, they again withdrew their Replication, and amended their Bill, by filing another new Ingrossment of two hundred and seventy-four folios. In January last they again filed a Replication; and in May they obtained another Order to amend.

Mr. *Knight*, in support of the Motion, cited the following Cases. *Anon. (a)*, *Rennet v. Green (b)*, and *Freke v. Culpepper (c)*.

Mr. *Duckworth*, *contra*, cited *Deggs v. Colebrook (d)*, and *Earl of Massarene v. Lyndon (e)*.

The VICE-CHANCELLOR:—

I am not, at present, to inquire whether the Sum allowed for Costs upon amending a Bill is or is not too small. It is adopted as a general Rule, in order to avoid the inconvenience of entering into the consideration of the merits of the Amendments in each particular Case. But if, without entering into the merits of the Amendments, there be found, in the circumstances of the Case, plain oppression by unnecessary expense, the Court will relieve the Defendant. In this Case there have been three Amendments by new Ingrossments, and the two last without further Answers.

The first of the three Amendments may have been made necessary by the Answer; and therefore I cannot give the Defendant the extra Costs of that Amendment.

(a) 2 Atk. 123. (b) 1 Cox, 253. (c) 1 Dick. 284.

(d) 1 Atk. 396. (e) 2 Bro. C. C. 291.

But there was no further Answer put in before the second and third Amendments; and the third Amendment reduced the Bill from four hundred and thirty folios to two hundred and seventy four. I must assume, therefore, in the absence of all explanation, that these second and third Amendments would not have occurred if due diligence and attention had been used on the part of the Plaintiff; and the Defendant is therefore entitled to be relieved against the extra expense of these two Amendments thus unnecessarily occasioned.

1823.

WATTS
v.
MANNING.

Dame MARY PALMER, Widow.

v.

The Right Hon. FREDERICK Earl of CARLISLE,
and Others.

1823.
17th June.

Mortgage.
Pleading.

ONE of the questions in this Cause was, whether a person who was entitled to a sixth part only of a sum of Money due on a Mortgage could file a Bill for a Foreclosure of a sixth part of the mortgaged Estate.

By an Indenture, dated the 20th of January 1770, Lord *Carlisle* assigned certain Manors and other Hereditaments to *Thomas Hanway*, subject to Redemption on Payment of 12,000*l.* and Interest, on the 20th of July following.

2,000*l.* part of the 12,000*l.* belonged to *Wm. Hanway*, a Brother of *T. Hanway*, and the remainder belonged to *T. Hanway*.

T. Hanway, by his Will, gave to his Wife, *Ann Hanway*, 2,000*l.* part of the 10,000*l.* for her own use;

A Person entitled to part only of a sum of Money due on Mortgage, can not file a Bill for a Foreclosure of the same part of the mortgaged Estate.

There can be no Redemption or Foreclosure unless the Parties entitled to the whole of the Mortgage Money are before the Court.

1823.

PALMER
v.
the Earl of
CARLISLE
and others.

and he gave 8,000*l.* the remainder of that Sum, to *R. Heron*, and *Wm. Painter*, upon Trust, to pay the Interest of it to his Wife for her Life; and after her decease, to pay the Interest of 4,000 *l.* part of the 8,000*l.* to his Nephew, *T. Altham*, for his Life; and after *T. Altham's* decease, to that Gentleman's Widow (if he should leave one) for her Life; and, after her decease, to pay the Principal to *T. Altham's* Children, at the usual periods, in equal Shares; and he appointed *Jonas Hamway*, *Richard Heron*, and *W. Painter*, Executors of his Will.

In September 1772 *T. Hamway* died. His Will was proved by all his Executors. *Heron* was the Survivor of them. He died in 1805; and Sir *Robert Heron*, one of the Defendants, was his Personal Representative. *Ann Hamway*, *T. Hamway's* Widow, died in 1778.

Thos. Altham died in 1782, leaving the Plaintiff, and *Thos. Wm. Altham*, his only Children.

By Articles, dated the 17th day of January 1791, and entered into previously to the Plaintiff's Marriage with her late Husband, it was agreed that all the Property, both Real and Personal, to which the Plaintiff was then entitled, should be vested in Trustees, in Trust to sell, and therewith to discharge the Incumbrances then affecting her Husband's Estates.

T. W. Altham died in 1794, intestate, and the Plaintiff took out Letters of Administration to his Estate.

The whole of the 12,000*l.* still remaining unpaid, the Plaintiff filed her Bill, praying that an Account might be taken of what was due to her on the Mortgage, in

1823.

PALMER
v.
the Earl of
CARLISLE
and others.

respect of the 2,000*l.* her late Brother's Share, being a sixth part of the 12,000*l.*; and that Lord *Carlisle* might be decreed to pay what should be found due to her, or be foreclosed from all Equity of Redemption in one sixth part of the mortgaged Premises.

None of the Persons who had any Interest, either legal or equitable, in the 12,000*l.* except the Plaintiff and Sir *Robert Heron*, were made Parties to the Suit; nor was any reason assigned in the Pleadings for that omission.

Lord Carlisle, by his Answer, submitted that an Account should be taken of the whole of the 12,000*l.* and not of the 2,000*l.* only; as otherwise he might be put to unreasonable and unnecessary charges in taking many different Accounts in respect of the same Mortgage.

Mr. *Horne*, and Mr. *Longley*, for the Plaintiff:—

In *Montgomerie v. The Marquis of Bath* (a), a Decree was made for a partial Foreclosure. The Registrar's Book has been looked at, in order to see if the Decree in that Case was made by consent; and it does not appear that that was the case.

Mr. *Barber*, for Sir *Robert Heron*.

Mr. *Heald*, Mr. *Wingfield*, Mr. *Sugden*, and Mr. *Tinney*, for the other Parties to the Suit.

The VICE-CHANCELLOR:—

There can be no Foreclosure or Redemption, unless the Parties entitled to the whole Mortgage Money are before the Court. The Bill must be dismissed against *Lord Carlisle*, with Costs.

(a) 3 Ves. 560. But see *Lowe v. Morgan*, 1 Bro. C. C. 368.

1823.
27th June.

WILLIAMS v. DAVIES.

Exceptions

Exceptions having been allowed to the Answer, and the Bill having been amended, and the usual Order obtained that Defendant should answer the Amendments and Exceptions at the same time, Defendant put in a second Answer. The Plaintiff then took Exceptions to the second Answer, and intitled them, "Exceptions to the further Answer to the original Bill, and to the Answer to the amended Bill."

The Exceptions were held to be irregularly intitled, and were ordered to be taken off the file; because new Exceptions cannot be taken to the further Answer to the original Bill; but, if that Answer be considered insufficient, it must be referred back to the *Master* upon the old Exceptions.

THE Plaintiff (a married Woman) had taken Exceptions to the Answer; and, on some of them being allowed, obtained an Order that she should be at liberty to amend her Bill, and that the Defendant should answer the Exceptions and Amendments at the same time.

In obedience to this Order, the Defendant put in a further Answer to the original Bill, and an Answer to the amended Bill. The Plaintiff then took Exceptions to the Answer to the Amendments, and, on the 18th of this month, obtained another Order, by which, after reciting that the Plaintiff had taken Exceptions to the Answer to the original Bill, and that that Answer was reported insufficient; whereupon the Plaintiff obtained an Order to amend her Bill, and that the Defendant should answer the Exceptions and Amendments at the same time; and that the Defendant had since put in his Answer to the said Exceptions and Amendments, and that the Plaintiff was advised that that Answer also was insufficient, and that she had taken Exceptions thereto as to the Amendments: It was ordered, that it should be referred back to the *Master*, to look into the Plaintiff's Bill, the said Defendant's said Answers, and the Plaintiff's said Exceptions; and to examine and certify whether the said Defendant's said Answer to the said Exceptions and Amendments was sufficient or not.

1823.

WILLIAMS
v.
DAVIES.

The second set of Exceptions was intitled as follows: "Exceptions taken by the said Complainant to the further Answer put in by the said Defendant, *Lewis Davies*, to the original Bill of Complaint, and his Answer to the amended Bill of Complaint filed by the said Complainant in this Cause."

Mr. *Bell*, and Mr. *Barber*, for the Defendant, now moved that these Exceptions might be taken off the file, for irregularity; that the Plaintiff's next Friend might be ordered to pay the Costs of the Application, and of filing the Exceptions; and that the Order of the 18th of June might be discharged.

These Exceptions purport to be Exceptions to the further Answer to the original Bill, as well as to the Answer to the amended Bill; and, if they went to the *Master* under that title, he would not be able to dispose of them. The Answer to the amended Bill, for the purpose of being excepted to, is quite distinct from the further Answer. The sufficiency of the further Answer, and of the Answer to the amended Bill, ought to be submitted to the *Master* as two distinct questions; and therefore the proper way is to intitle the new Exceptions as Exceptions to the amended Bill, and to obtain an Order for referring back the further Answer upon the old Exceptions. It is extremely doubtful whether the Order of the 18th of June did refer back the further Answer upon the old Exceptions. *Partridge v. Haycraft* (a).

Mr. *Treslove*, for the Plaintiff:—

The Title to these Exceptions is quite regular, according to the practice of the Court. In taking

(a) 11 Ves 570.

1823.

WILLIAMS
v.
DAVIES.

Exceptions it is necessary to refer to the Answer with certainty. Now if these Exceptions had been intitled as Exceptions to the Answer to the amended Bill, the Defendant would have said there is no such Record. The Record is indivisible, and it purports to be a further Answer to the original Bill, as well as an Answer to the amended Bill. If we were proceeding by indictment for Perjury in this Answer, and the indictment were to allege that Exceptions had been taken to the Answer to the amended Bill, there would be a variance when the Record was produced. The *Lord Chancellor*, in his Judgment in *Partridge v. Haycraft* (b), says, "That where an original Bill has been filed, and Exceptions have been taken to the Answer, and the Plaintiff moves to amend, if he goes upon the Answer to the original and amended Bill as insufficient, he must go before the *Master* upon the old Exceptions, as they apply to the original Bill, and upon the new Exceptions as to the new matter introduced by the Amendments." That is what the Plaintiff has done here. The Order of the 18th of June clearly refers back the further Answer upon the old Exceptions, as well as the Answer to the amended Bill upon the new Exceptions: for the expression "said Exceptions," must mean both sets of Exceptions; and the next sentence makes it quite plain; for there it is referred to the *Master* "to examine and certify whether the said Defendant's said Answer to the said Exceptions and Amendments is sufficient."

But supposing that the Title to these Exceptions is wrong, it is not necessary that they should be taken off the file; for they may be amended, as was done in a Case in the Exchequer, where an Answer was filed without the

(b) 11 Ves. 581.

Schedule being signed ; the Court would not order the Answer to be taken off the file, but only directed the Schedules to be signed.

1823.

WILLIAMS
v.
DAVIES.

The VICE-CHANCELLOR:—

These Exceptions are intitled as Exceptions to the further Answer to the original Bill, and the Answer to the amended Bill. As Exceptions to the Amendments they are regular ; but no new Exceptions can be taken to the further Answer to the original Bill. If that part of the Answer be considered insufficient, it must be referred back to the *Master* upon the old Exceptions. These Exceptions, therefore, being irregularly intitled, must be taken off the file.

ACTON and Others v. WHITE and Another.

1823.
27th June.

THIS Suit was instituted for a Specific Performance of an Agreement which the Defendant had entered into for the Purchase of the Royal Hotel at *Bognor*, in *Sussex*, and certain Lands, part of the Real Estates of the late *Nathaniel Wright*, and which had been devised by him to Trustees, in Trust for the separate use of his Wife, *Sarah Wright*, for her Life ; and after her decease, in Trust for the Plaintiff, *Samuel Acton*, in Fee. Mrs. *Wright* was willing to join in the Conveyance to the Purchaser ; but the latter objected to the Title, on the ground that Mrs. *Wright* was, by the terms of the Will, restrained from alienating her Life Estate.

Will.
*Power to alienate
separate Prop-
erty.*

Testator devised a Freehold Estate to Trustees, in Trust, to pay the Rents, as the same should become due and payable, into the hands of his Wife, and not otherwise, for her Life, for

her separate use ; and directed that the Receipts of his Wife alone for what should be actually paid into her own proper hands, should be good Discharges to his Trustees. Held, that the Wife had power to alienate her Life Estate.

1823.

ACTON
and others

v.

WHITE
and another.

The part of the Will necessary to be stated in order to explain the Arguments in support of the Objection, was as follows :

“ I give, devise, and bequeath, unto *Samuel Acton*, Sir *L. Harvey*, and *T. Greenaway*, their Heirs, Executors, Administrators, and Assigns, all and every my Estate and Effects, both Real and Personal, whatsoever and where-soever, that I am in anywise entitled to or interested in, in Possession, Reversion, Remainder, or Expectancy, To hold, as to such parts thereof as are Freehold, unto and to the use of them the said *S. Acton*, Sir *L. Harvey*, and *T. Greenaway*, and their Heirs; and as to such part thereof as is considered a part of my Personalty, To hold such last-mentioned part thereof unto them the said *S. Acton*, Sir *L. Harvey*, and *T. Greenaway*, their Executors and Administrators ; but upon this special Trust and Confidence nevertheless, as to the whole of the said Real and Personal Estate, that they the said *S. Acton*, Sir *L. Harvey*, and *T. Greenaway*, their Heirs, Executors, and Administrators, do and shall, after payment of my just Debts, Funeral Expenses, and the Legacies by me herein bequeathed, (to the payment of which I subject and make liable all my Estate and Effects, as well Real as Personal, and also of the Costs and Charges attending the carrying into execution the Trusts of this my Will), pay, or cause to be paid, all the Rents, Interest, and Dividends, and Proceeds of all and every my aforesaid Freehold, Leasehold, and other my Personal Estate and Effects, of what nature or kind soever, unto and for the sole and separate use of my said Wife, during the term of her natural Life, and so as not to be in anywise subject to the Debts, Control, or Engagements of any future Husband she may happen to marry after my death ; and to that end, that they the said *S. Acton*, Sir *L. Harvey*, and *T. Greenaway*, and the Survivors and

Survivor of them, his Executors or Administrators, do and shall from time to time pay the Dividends, Interest, and Annual Produce, as the same shall become due and payable, into the hands of her the said *Sarah Wright*, and not otherwise. And I will also; that the Receipt or Receipts of my said Wife, *Sarah Wright*, alone, for what shall be actually paid into her own proper hands as aforesaid, for and in respect of the Rents, Interest, Dividends, or Annual Produce, shall from time to time, notwithstanding her Coverture, and whether she shall be Covert or Sole, be a good and sufficient discharge and indemnity to the said *S. Acton*, Sir *L. Harvey*, and *T. Greenaway*, and the Survivors and Survivor of them, in respect thereof."

1823.
 ACTON
 and others
 v.
 WHITE
 and another.

The Parties had agreed to take the Opinion of the *Vice-Chancellor* upon the validity of the Objection before mentioned, and to be bound by that Opinion.

Mr. *Sugden*, for the Purchaser:—

In deciding this question, the Court must look at the actual words used by this Testator. No one doubts, that if he had said that his Wife should not have power to anticipate the Rents of these Estates, she would not have been able to part with her Life Estate. The words here used are stronger than any that ever occurred, except where words of actual Restriction are used. For here the Testator directs that the Rents shall be paid, as they shall become due and payable, into the hands of his Wife, and not otherwise; not into the hands of her or her Appointees, as in ordinary Cases. How is it possible for the Court to say, that by these words the Testator did not mean to restrain his Wife's power of Alienation? There is no other way to give effect to all the words of this Will than by construing these words

1823.

ACTON
and others
v.

WHITE
and another.

to amount to a Restriction of the power of Alienation. Then the Testator says, that the Receipt of his Wife alone shall be a sufficient discharge. Here the word "alone" does not mean "without her Husband," but points to an absolute Restriction. I must refer your Honor to a Case mentioned by Sir W. Grant, M. R. in his Judgment in *Wagstaff v. Smith* (a); there, that learned Judge, in a Case where the words were not nearly so strong in favour of a restraint on Alienation as those now under consideration, says, that he thought that an absolute Property was not intended to be given, so as to give a power of Disposition. But should your Honor be of opinion that this Lady has power to alienate her Life Interest, I submit that these words raise so serious a doubt upon that point, that a Specific Performance ought not to be decreed.

Mr. Bell, Mr. Preston, and Mr. Lovat, were to have argued in support of the Title.

The VICE-CHANCELLOR:—

It is now too late to contend that a Lady is restrained from the power of alienating her Life Interest, because it is given to her sole and separate use, and is to be paid into her own proper hands, and upon her Receipt alone. The contrary is settled by repeated Authorities. The construction given to the expressions in question is, that they are intended only to exclude the marital claims of any present or after-taken Husband; and not to control that right of Disposition which is incident to Property. Let a Specific Performance of the Agreement be decreed.

(a) 9 Ves. 524.

"It seems the Injun in this case was not the common Injun but an Injun to stay waste on certificate of Bill filed and aff'd of merits - 2 Sim. 488. n.

PRATT v. ARCHER.

Pickering

Hanson. 2 Sim.

1823.

28th June.

IN this Case the common Injunction had been obtained; and Mr. Sugden, and Mr. Wray, for the Plaintiff, now moved to amend the Bill, without prejudice to the Injunction, by adding a Prayer to restrain a Proceeding by Distress.

*Practice.
Amendment,
without prejudice
to Injunction.*

Mr. Knight, for the Defendant, opposed the Motion.

The Vice-Chancellor said, that upon referring to Mr. Walker, the Registrar, as to the Practice in Cases of Amendment without prejudice to Injunctions, he had stated, that the subject had come before the Lord Chancellor, and that he understood it to be his Lordship's Opinion, (although his Lordship had never absolutely decided the point) that a Motion to amend without prejudice to an Injunction, was a Motion of course, and might be made without notice, where the Injunction had been granted on the Merits; but that where the Injunction had issued on account of delay, notice must be given, and the proposed Amendments stated (a).

Where an Injunction has been granted on Merits, a Motion to amend, without prejudice to the Injunction, is a Motion of course; but where it has issued on account of Delay, Notice of the Motion must be given, and the proposed Amendments must be stated.

(a) See *Turner v. Bazeley*, 2 V. & B. 330; *Sharp v. Ashton*, 3 V. & B. 144; and *Mair v. Thelkisson*, in the Note on that Case. But *Penfold v. Stoveld*, 3 Mad. 471, is *contrà*.

*Reversed on appeal the note p. 445
See 1 Term. Eq. 155.*

1823.
23d July.

WINTER v. LORD ANSON.

Lien.
Purchase Money.

Where the Purchase Money for an Estate was, in pursuance of the agreement for the Purchase, secured by the Bond of the Purchaser, payable at the death of Vendor, with Interest; but the Conveyance expressed that it had been paid, and had the Vendor's Receipt indorsed upon it: held, that the Vendor had no Lien on the Estate for the amount of the Bond.

THIS was a Bill by the Personal Representatives of a Vendor, against a Purchaser, who had become Bankrupt, and his Assignees; and also against a Purchaser from the Assignees, to establish a Lien upon Real Estate for part of the Purchase Money.

William Winter, the Vendor, was in June 1814 seised in Fee of an Estate, partly Freehold, and partly Copyhold. By Articles of Agreement, dated the 16th of June 1814, made between *William Winter* of the one part, and *William Mousley* of the other part, *Winter*, in consideration of the sum of Money therein mentioned agreed to be paid to him by *Mousley*, agreed to convey and surrender the Freehold and Copyhold Estate to *Mousley* in Fee Simple, free from all Incumbrances; and *Mousley* agreed to pay to *Winter*, on the 29th of September then next ensuing and on the execution of the Conveyance and completion of the Surrender, the Sum of 75*l.* per Acre for the Estate, the quantity of Land to be ascertained and measured by a Person named in the Agreement, and to be paid for by *Mousley* accordingly; and it was thereby also agreed in the following words: "That the Amount of such Consideration Money shall be secured by the Bond of the said *William Mousley* unto the said *William Winter*, with Interest, at 4*l.* per centum per annum, and shall remain so secured during the Life of the said *William Winter*, on the regular payment of such Interest as aforesaid."

The Estate was measured, and the Purchase Money found to amount to 1,485*l.*; being 576*l.* for the Freehold, and 909*l.* for the Copyhold. By Indentures of Lease and Release, dated the 28th and 29th of Sept. 1814, and made in pursuance of the Agreement, *Winter*, in consideration of 576*l.* therein expressed to have been paid to him at or before the execution of the Conveyance, for the Purchase of the Fee Simple of the Freehold part of the Estate, conveyed the Freehold part of the Estate to *Mousley* in Fee Simple. A Receipt for the 576*l.* was indorsed on the Deed of Release. On the 1st of October 1814, in further pursuance of the Agreement, *Winter* surrendered the Copyholds to *Mousley* in Fee Simple; and this Surrender was expressed to be made in consideration of 909*l.* paid by *Mousley* to *Winter*, the Receipt whereof *Winter* thereby acknowledged.

1823.

WINTER
v.
LORD ANSON.

Notwithstanding the Conveyance and Surrender expressed that the whole Purchase Money had been paid, the sum of 485*l.* was the only part of it that had in fact been paid. And on the 29th of September 1814, *Mousley* executed a Bond to *Winter* in the penal sum of 2,000*l.* conditioned to be void on payment, by *Mousley* to the Executors, Administrators or Assigns of *Winter*, of the sum of 1,000*l.*; the remainder of the Purchase Money within twelve months next after the decease of *Winter*, with Interest at four per cent.

Mousley having paid the 485*l.* and executed this Bond, was let into Possession of the Estate.

By Deed, dated the 2d of November 1814, *Mousley* mortgaged the Freehold part of the Estate for the term

1823.

WINTER
v.
Lord ANSON.

of five hundred years, to *Anne Baggalay*, to secure 400*l.* which he had borrowed of her; and on the 10th of May 1815, he surrendered the Copyholds to one *Gould*, in Fee, to secure 1,000*l.* which he had borrowed of *Gould*.

In May 1817 a Commission of Bankrupt issued against *Mousley*; and, on the 7th of June 1817, the Bargain and Sale to his Assignees was executed. In August 1817, the Assignees sold and conveyed the Freehold and Copyhold Estate in question to Lord *Anson*, together with some other Real Estates belonging to *Mousley*, and allowed his Lordship to retain 1,200*l.* of the Purchase Money, as an indemnity against the claim of the Plaintiff. The Assignees paid off the Mortgages to *Anne Baggalay*, and *Gould*, out of the Personal Estate of *Mousley*.

The Interest on the Bond was paid down to the 29th of September 1816, but not afterwards; and *Winter*, in Trinity Term 1818, brought an Action against *Mousley* on the Bond, and at the Lent Assizes in 1819 obtained a Verdict against him. *Mousley* obtained a Rule *Nisi* to set aside the Verdict, on the ground that he was a Bankrupt at the time when the Action was brought; but this Rule was afterwards discharged.

Mousley obtained his Certificate under the Commission of Bankrupt.

In May 1819 *Winter* died, without having entered up Judgment on the Verdict against *Mousley*; and the Plaintiffs, who were the Executors of *Winter*, had not

entered up Judgment, because *Mousley* had no Property on which it could be made available.

1823.

WINTER

v.

Lord ANSON.

The Plaintiffs insisted, by their Bill, that *Anne Baggalay*, and *Gould*, the Mortgagees of the Estate, had notice of the Lien on the Estate claimed by *Winter* in respect of the 1,000*l.*; and that, if the Mortgages were still subsisting, they would not be entitled to any priority over the Lien so claimed. They also insisted that the Assignees had notice of the Lien; and that, although they had paid off the Mortgages out of *Mousley's* Personal Estate, they were not entitled to reimburse his Personal Estate out of the Money produced by the Sale of his Real Estates, until they had discharged the sum in respect of which the Lien was claimed; or, in case the Court should be of opinion that the Mortgages, if subsisting, would be a prior charge to the Lien, that, inasmuch as the Mortgages had been paid off by the Assignees, the Estates must now be considered as free from all Claims and Incumbrances, except the Lien claimed by the Plaintiffs.

The Bill prayed that it might be declared that the Plaintiffs, as the Personal Representatives of *Winter*, were entitled in Equity to a Lien upon the Freehold and Copyhold Estate, in respect of the 1,000*l.*, as well against the Mortgagees, and all Persons claiming on their behalf, as against *Mousley*; and for an Injunction to restrain Lord Anson from paying over the 1,200*l.* to the Assignees until the claim of the Plaintiffs was satisfied.

The Assignees, in their Answer, stated that they had been informed, and believed, that upon the occasion of *Mousley* executing the Bond, it was agreed between *Winter* and *Mousley*, that *Winter* should accept the

1823.

WINTER
v.

Lord ANSON.

Bond as payment of so much of the Purchase Money as the Bond amounted to, and that *Winter* should have no Claim or Lien upon the Estate in respect of it.

When the Cause came on to be heard on the 27th of November 1821, the *Vice-Chancellor* referred it to the *Master*, to inquire, whether, at the time of executing the Bond, it was agreed between *Winter* and *Mousley*, that *Winter* should accept the Bond as payment of so much of the Purchase Money as the Bond amounted to; and that *Winter* should have no Lien upon the Estate in respect of it.

The *Master* reported as follows:—

“ I find, that upon the execution, by the Defendant *William Mousley*, of the Bond bearing date the 29th day of September 1814, it was not agreed between *William Winter* therein named, and the said Defendant *William Mousley*, that the said *William Winter* should accept of the said Bond as payment of so much of the Purchase Money of the Estates and Premises in question in this Cause as the said Bond amounted to, and that the said *William Winter* should have no Lien upon the said Estate and Premises, or any part of the same in respect thereof. But I find, by the Deposition of *Francis Sharrett*, one of the Witnesses, taken on the Cross-interrogatories exhibited on the part of the Defendants, and the Person who prepared the said Agreement as the Attorney of the said *William Winter*, that in or about a week after the Agreement bearing date the 16th day of June 1814 had been made, and previously to the execution of the said Bond, he, in conversation with the said *William Winter*, pointed out to him the imprudence of trusting to the Personal Security alone of the said *William Mousley* for the payment of the said Pur-

chase Money. And the said *Francis Sharrett* told the said *William Winter*, that he, the said *Francis Sharrett*, knew that the said *William Mousley* was concerned in extensive Trade and Speculations, and had borrowed Money. And the said *Francis Sharrett* strongly urged the said *William Winter* to have a Mortgage for the Purchase Money, and told him, that he the said *Francis Sharrett* thought there would be considerable danger in taking a Bond only; but the said *William Winter* replied that the Bond would be a sufficient Security; and that he had no doubt, if the said *William Mousley* outlived him, the Bond would be paid; and that he should be satisfied to take the said *William Mousley's* Personal Security."

1823.
 WINTER
 v.
 Lord ANSON.

The Cause now came on to be heard for further directions.

Mr. *Heald*, and Mr. *Wheatley*, for the Plaintiffs:—

The settled principle of the Court is, that a Vendor has always a Lien on the Estate till the whole of his Purchase Money is paid, unless there be a manifest intention that he should have no such Lien. That was the principle laid down in *Mackreth v. Symmons* (a), where Lord *Eldon* reviews the whole of the Cases on this subject. It was there held that there must be clear evidence of relinquishment of the Lien; and that it is for the Purchaser to produce this evidence if he resists the Lien. In *Tardiff v. Scrughan*, stated in the Argument of *Blackburne v. Gregson* (b), it was decided by Lord *Camden*, that the Vendor of an Estate in consideration of an Annuity, did not, by taking a Bond from the Purchaser as a collateral Security for the payment

(a) 15 Ves. 329.

(b) 1 Bro. C. C. 423.

1823.

WINTER
v.
Lord ANSON.

of the Annuity, lose his Lien on the Estate. In *Elliott v. Edwards* (c) Lord *Alvanley* held that the Vendor, by taking a Covenant from the Purchaser and another Person as his security, did not lose his Lien on the Estate. *Fawell v. Heelis* (d) is the only Case in which it was ever held that the Vendor, by taking a Bond for the Purchase Money, had lost his Lien on the Estate. But that Case has not been considered as good authority. In *Ex parte Parkes* (e), which is one of the latest Cases, it was admitted that the Lien of the Vendor was not discharged by his taking a Bond from the Purchaser for payment of the Purchase Money; although it was held, that the nature of the Covenants, and of the transaction in that Case, had discharged the Lien.

Mr. *Skirrow*, for the Defendant, *Mousley*, the Bankrupt, (who had an interest in establishing the Lien,) insisted, that postponing the payment of the Principal of the Purchase Money during the Life of the Vendor afforded no argument against the continuance of the Lien, because the Purchaser might at any time have got rid of the Lien by paying up the Principal.

Mr. *Bell*, and Mr. *Bickersteth*, for the Defendants the Assignees:—

I. The principle on which Courts of Equity admit the Lien of the Vendor is not that of Contract, but that, until the Purchase Money is paid, the Estate in Equity is the Estate of the Vendor. On this principle it has

(c) 3 Bos. & Pul. 181.

(d) Amb. 724; and also stated from Serjeant *Hill's MSS.* in Mr. *Eden's* edition 1 Bro. C. C. 420, in a Note to *Blackburne v. Gregson*.

(e) 1 Glyn & Jan. 228.

been held that, where the Consideration Money was not paid *pecuniis numeratis*, but by a cheque on a Banker, if the Banker had no effects, the Lien was clearly not gone. Nor is it gone where the Purchaser gives a promissory Note for the Purchase-money; nor even where he gives a Bond, if it be payable at a short period. But the question in this Case is, whether the Security was not taken as an actual Discharge of the Purchase-money. The Bond here was not taken as a collateral Security, but as an actual Payment, so as to give the Purchaser an absolute dominion over the Estate. If the Purchaser had given a Bill, or a Bond, which was not paid at the date fixed for that purpose, it would have been impossible to say that the Purchaser was paid, or the Lien discharged. Lord *Eldon* says, in *Mackreth v. Symmons* (f), that the intent in taking a Bond is to rebut the presumption that the Purchase Money is paid. But if a Bond is taken, on the face of which it appears that the Purchase Money is to be paid by an Annuity to the Vendor, and the payment of a Principal Sum to his Representatives at his death, this shows a special Contract—it shows that the Parties were not dealing for ready Money, but on a special Contract as to the mode of payment, and therefore that the Lien is discharged. The Lien being once discharged by the mode in which the Parties have dealt, it is gone for ever.

1823.
WINTER
v.
Lord ANSON.

II. The principle of the Court being against the existence of Lien in such a case, it only remains to consider the Authorities. Lord *Eldon*, in *Mackreth v. Symmons* (g), said, that *Tardiff v. Scrughan* (h) was not a Case of such authority as to guide his

(f) 15 Ves. 342.

(g) 15 Ves. 352.

(h) Stated in 1 Bro. C. C. 423.

1823.

WINTER
v.
Lord ANSON.

judgment. The Case of *Edwards v. Elliott* (i) has no application to the present. In order to make out the Case of the Plaintiffs, the Bond ought to have been unalienable during the Life of *Winter*. In *Bond v. Kent* (k), where the Vendor took a promissory Note, payable on demand, from the Purchaser for part of the Purchase Money, it was held that the Lien was discharged; and so in *Nairn v. Prowse* (l), where the Vendor took a Security on Stock. Therefore, according to the Authorities, collateral circumstances may be resorted to in order to rebut the presumption of Lien. In the present Case we resort to the Agreement. The Bond secures payment of the Purchase Money, according to the terms of the Agreement, as to the *quantum* of the Money; therefore the Bond and the Agreement depend sufficiently on each other to rebut the presumption of Lien. The special circumstances stated by the *Master* in his Report show that the Vendor placed reliance on the personal security of the Purchaser. Where a Purchaser is allowed to take possession of an Estate as absolute owner on a Conveyance expressing Receipt of the Purchase Money by the Vendor, and the Vendor takes a Bond as a Security, to allow the Vendor still to have a Lien, would be to enable the Purchaser to commit Fraud; because in such a case he appears in the character of absolute Owner of the Estate, and obtains Credit in that character. This is exactly the inconvenience insisted on by Sir *W. Grant*, in the Case of *Nairn v. Prowse* (m).

Mr. *Heald*, in reply:—

If the mode of payment expressed in the Agreement had appeared upon the face of the Deed of Conveyance,

(i) 3 Bos. & Pull. 181.

(l) 6 Ves. 752.

(k) 2 Vern. 280.

(m) 6 Ves. 752.

1823.

WINTER
v.
Lord ANSON.

it would have entirely destroyed the Argument as to Fraud; and the mere circumstance that it was a mode which postponed the payment of the Principal, would not be enough to discharge the Lien. If the Conveyance had been expressed to be made in consideration of an Annual Payment, even in that case the Argument as to Fraud would fail. But whatever may be expressed in the Articles of Agreement, the Court, if it finds a Conveyance executed, cannot look at the Articles, because that would be giving a construction to a Deed by an Instrument which is not a Deed. The Case, therefore, on the whole, comes to this: That the Intention to abandon the Lien must be established on clear evidence: That a Bond or a Note taken by the Vendor has been held not of itself sufficient Evidence of abandoning the Lien; and therefore, that taking a Bond payable at a future time is not sufficient evidence to rebut the presumption that a Lien exists.

The VICE-CHANCELLOR :—

This Case is altogether new in its circumstances. The written Agreement of the Parties expresses that the Price of the Estate should not be paid till the death of the Vendor, the Vendee agreeing to pay Interest upon it by half-yearly payments until that period, and to give his Bond accordingly. But the language of the Conveyance does not proceed upon this Agreement. It is expressed to be made in consideration of a sum of Money then paid, the Receipt for which is indorsed upon the Deed. The terms of the written Agreement, however, did in fact govern the conduct of the Parties, and a Bond was taken for the payment of the Purchase Money at the death of the Vendor, and for payment of Interest in the mean time; and the question is, whether,

1823.

WINTER

v.

Lord ANSON.

Where a Conveyance is executed to a Purchaser, which expresses that the Purchase Money is paid, the Estate does not, in Equity, pass by the Conveyance till the Purchase Money is actually paid, although a Receipt for the Purchase Money is indorsed on the Conveyance.

under these circumstances, the Vendor has a Lien upon the Estate.

In ordinary Cases, where the Conveyance expresses, contrary to the fact, that the Purchase Money is paid, there, though the Estate passes at Law by the Conveyance, it does not pass in Equity until the actual Payment of the Price—until the Vendor has received that Consideration for which it appears by the Deed he contracted to part with his Estate.

Suppose it had been expressed in this Conveyance that the Price was not to be paid until the death of the Vendor, and there had been a Covenant on the part of the Purchaser then to pay the Amount, and to pay the Interest in the mean time; could it then have been said that it appeared by this Deed that the Vendor had contracted not to part with his Estate until the actual payment of the Price? Would it not rather have been the true effect of the language of the Conveyance in such Case, that the Vendor had contracted to part with his Estate presently, not in consideration of the actual immediate Payment of the Price, but in consideration of the Covenant for the future Payment of that Sum, with interim Interest; and that having, therefore, the Covenant, which was the Consideration bargained for, the Estate must pass by the Conveyance, in Equity as well as at Law. Now although it is not expressed in this Conveyance that the Price was not to be paid until the death of the Vendor, yet such was, in fact, the actual Agreement and substantial dealing of the Parties, and the language of the Conveyance to the contrary is the mere result of the common form; and the question comes to this, whether the Court is concluded by the

form of the Deed from entering into the truth of the Case.

1823.

WINTER
v.
Lord ANSON.

If the language of the Deed is to prevail in this Case, then the Price is to be taken as actually paid; for so it is expressed in the Deed. It is the Vendor, therefore, who in the first place attempts to raise an Equity against the Allegations of the Deed; and if the Vendor be permitted to repel the effect of the Deed, by showing that the Price was not paid, it must necessarily follow that the Vendee must be at liberty to disclose the whole truth, and to explain the reason why that payment was not made. I consider, therefore, that the Case is, in principle, the same as if the Conveyance had stated the real Contract of the Parties; and that by the effect of that Contract the Vendor agreed to part with his Estate, in consideration of the Bond for the future payment of the Price; and that, when such Bond was executed, the Estate passed to the Vendee, in Equity as well as at Law.

Where a Vendor agrees to sell Real Estate, in consideration of a Bond for the Purchase Money payable at a future period, with Interest in the meantime, the Estate passes to the Purchaser on the execution of the Bond and of the Conveyance, and the Vendor has no Lien for the amount of the Bond.

Bill dismissed.

Reversed on Appeal by Lord Chancellor L.C.

3 Rep. 488. a subsequent appeal to D.C. compromised

The point came again before Lord MR. in Sweetland v Parrot 7th July 1834th where he adhered to his orig. own decision in Winter v L Anson. and expressed strong disapprobation of Lord Chancellor's doctrine, stating that it stood alone and that even had it been affirmed in D.C. he should not have treated it as a binding authority. In Sweetland v Parrot a bond was given and the receipt indorsed on the deed purported to be a receipt for the bond; it was decided on the principle that the bond was given as satisfaction and not merely as a collateral security. 1834

1823.
25th April.
3d May.
6th & 7th June.

Practice.
Witness.

A Party who examines a Witness is bound to keep him in town for forty-eight hours after his production at the seat of the adverse Clerk in Court; and, if Cross-interrogatories are left with the Examiner within the forty-eight hours, the Party must keep the Witness in Town till the Cross-examination is finished.

Where a Witness left London before the forty-eight hours were expired, the Party producing him was ordered to bring him back at his own expense, or the Examination in chief to be suppressed.

WHITTUCK v. LYSAGHT.

IN this Cause the Court was moved, on behalf of the Defendant, that the Plaintiffs, or their Solicitor, might, at their own proper costs and charges, produce two Witnesses named in the Notice of Motion, within ten days, to be cross-examined on the part of the Defendant, or, in default of such production, that the Evidence given in chief by these two Witnesses might be suppressed.

On the 18th of March 1823 the two Witnesses were brought to Town from *Gloucestershire* by the Plaintiffs, to be examined on their behalf. At eleven o'clock on that day they were produced at the seat of the Defendant's Clerk in Court, and within a few minutes afterwards were carried to the Examiner's Office and examined. Their examination did not last above a quarter of an hour. On the following morning, as soon as the office was opened, Interrogatories were filed for their cross-examination; and, between twelve and two o'clock on the same day, the Defendant's Solicitor sent for the Witnesses, and brought them to the Examiner's Office, where they were then sworn to give evidence for the Defendant on cross-examination; and the Examiner then desired them to return at ten o'clock on the following morning (the 20th of March) to be cross-examined. They did not, however, attend at the time appointed; but set off in the afternoon of the 19th of March, on their return into *Gloucestershire*, in a stage-coach, in which places had been taken for them by the Plaintiffs Solicitor. The Defendant's Solicitor, being informed of this, on the 20th of March served a Notice

on the Plaintiffs Solicitor, requiring him to produce these two Witnesses at the Examiner's Office on the 26th of March, to be cross-examined. This Notice not being complied with, the present Motion was made. The Plaintiffs afterwards offered to bring the Witnesses to Town to be cross-examined, provided the Defendant would pay the expenses of bringing them and sending them back; but this offer was refused.

1823.
WHITTUCK
v.
LYSAGHT.

It appeared that no Notice of the Cross-interrogatories having been filed was either delivered to, or put up in the office of the Examiner who had taken the depositions in chief.

Mr. *Bell*, and Mr. *Stuart*, for the Motion:—

It is the established practice that, where Witnesses from the Country are produced to be examined in chief, the Party producing them is bound to keep them in Town for forty-eight hours from the time of producing them at the seat of the Clerk in Court of the opposite Party; and if, during that time, Interrogatories are filed for cross-examining them, and they are sworn to give evidence on the Cross-examination, the Party who has brought the Witnesses to Town is bound to keep them in Town, at his own expense, till the Cross-examination is finished; and, if he allows the Witnesses to leave Town before the forty-eight hours are expired, or before the Cross-examination is finished, he is bound to bring them up again to be cross-examined, at his own expense. *Gilb. For. Roman.* 144. *Flowerday v. Collett* (a).

Mr. *Hart*, and Mr. *Wakefield*, for the Plaintiffs, insisted that Notice should have been given to the

(a) 1 Dick. 288.

1822.

WHITTUCK
v.
LYSAGHT.

Plaintiffs Solicitor, that it was intended to cross-examine the Witnesses. When a Witness is produced at the seat of the Clerk in Court, the Party intending to cross-examine him ought to give Notice, either that Interrogatories for cross-examination of the Witness are filed, or that it is intended to file them. If no such Notice is given, the Party is not bound to keep the Witness in Town, and the Party wishing to cross-examine must bring him back at his own expense. *Harr. Cha. Prac.* 261.

The *Vice-Chancellor* said, that he would direct a question to be sent to the Six Clerks to ascertain the Practice on this point.

A question was accordingly sent, and the Six Clerks certified :

“ That the Party examining a Witness in the Examiner’s Office is bound to keep him in London forty-eight hours after his production at the seat of the adverse Clerk in Court, and not forty-eight hours after the Examination is finished ; and that, if the Cross-interrogatories are left with the Examiner within the forty-eight hours, then the Party producing him must keep him in London till his Cross-examination is finished.”

The *Vice-Chancellor*, upon receiving this Certificate, granted the Motion, with Costs.

“ This Court doth order, that the Plaintiffs, at their own expense, do produce *George Jeffries* and *Job Jenkins* before *John Nursey Dancer*, one of the Examiners of this Court, within ten days after service of

his Order on the Plaintiffs, to be cross-examined as Witnesses on the part of the Defendant *Arthur Lysaght*, or, in default of such production, it is ordered, that the Evidence given in chief by the said *George Jeffries* and *Job Jenkins*, on behalf of the said Plaintiffs, be suppressed on the hearing of this Cause, and on all matters relating thereto; and it is ordered that the Plaintiffs do pay to the Defendant his Costs of this Application."

1823.

WHITTUCK
v.
LYSAGHT.

Reg. Lib. B. 1822. fol. 1921.

BARCLAY v. RAINE.

1823.
12th and 24th
July.

THE Plaintiffs filed this Bill to compel the Defendant specifically to perform an Agreement for the purchase of a Freehold Estate.

*Specific Performance,
Title Deeds.*

An Order was obtained, on the coming in of the Answer, for a reference to the *Master* to inquire whether the Plaintiffs could make a good Title. The *Master* reported, that the Plaintiffs could make a good Title; but that it appeared to him that the Plaintiffs were not in possession of, and were not in a situation to deliver to the Defendant the Title Deeds relating to the Estate. At the request of the Parties the *Master* stated, in his Report, the following facts as to the Title Deeds for the opinion of the Court:

A Purchaser is not bound to complete his Purchase without the Title Deeds, unless he has a legal Covenant to produce them.

A Covenant to produce Title Deeds runs with the Land for the benefit of Purchasers, but not for the benefit of Vendors.—Where one is in possession of Title Deeds relating to his own Lands as well as to the Lands of another Person, who has no Covenant for the production of the Title Deeds, whether such other Person has a general right in Equity to compel the production of the Deeds. *Qu.?*

1823.

BARCLAY
v.
RAINE.

The Premises in question in this Cause were formerly part of certain Hereditaments held under one Title, and a large proportion of such Hereditaments was sold to Mr. *John Thring*; and, about the same time, or soon after, the Premises in question were sold to Mr. *George Barclay*, the father of the Plaintiffs, and under whom they derive their Title. Upon the sale to Mr. *John Thring*, the Title Deeds to the Premises purchased by him, which also related to the Premises in question in this Cause, were delivered to him, and he executed a Deed of Covenant to the then Vendors, bearing date the 12th day of July 1797, whereby he covenanted with them to produce, at their request, the Title Deeds, for such purposes as should be required by the then Vendors, their Heirs, Executors, Administrators and Assigns, and at their expense. An attested Copy of this Deed of Covenant was delivered to Mr. *George Barclay* by his Vendors, and was, at the time when the *Master* made his Report, in the possession of the Plaintiffs; but it was in a very mutilated state, and partly illegible. This attested Copy was produced before the *Master*, who found that a considerable part of it was destroyed, and that the names of the attesting Witnesses were decayed, torn or obliterated. No Deed of Covenant was given to Mr. *Barclay* for the production of the Title Deeds. The original Deed of Covenant had since been lost: inquiries had been made for it, but without effect, and no hopes were entertained that it would be found. *John Thring* sold his part of the property to Mr. *Slade*, under whom Messrs. *James* and *John Slade*, the present Proprietors of it, claimed to be entitled. Application had been made by the Plaintiffs to Messrs. *James* and *John Slade* for a new Deed of Covenant to produce the Title Deeds; but they refused to give it. It appeared that upon the sale by *Thring* to Mr. *Slade*, part of the Purchase

Money was secured by a Mortgage of the Property sold to Mr. *Slade*, and the Title Deeds were, together with the Deed of Mortgage, lodged in the hands of Mr. *Thring*, where they still remained. The Plaintiffs, therefore, applied to Mr. *Thring* for a Covenant to produce the original Title Deeds, and *Thring* accordingly executed a Deed of Covenant, dated the 29th of October 1822, by which he covenanted with the Defendant *Raine*, that he would produce the Title Deeds whilst he should continue Mortgagee. The Defendant *Raine* objected to this last Deed of Covenant as insufficient, and therefore *Thring* executed another, dated the 18th of January 1823, by which he acknowledged the execution by him of the original Deed of Covenant of the 12th of July 1797, and also that the several Title Deeds mentioned in the Schedule to the original Deed of Covenant were, at the date of this last Deed, in his possession. Copies of these two Deeds of Covenant, of the 29th of October 1822 and the 18th of January 1823, were delivered to the Defendant's Solicitor before the filing of the Bill in this Cause. But the Defendant, when he agreed to purchase from the Plaintiffs, had no notice that they could not deliver the original Title Deeds to him, or that he was to have a Deed of Covenant for the production of them, or that they related to other Estates.

1823.
 BARCLAY
 v.
 RAINE.

Under these circumstances, the *Master* stated his opinion to be, that the Plaintiffs ought to procure a Deed of Covenant, to be executed by Messrs. *James* and *John Slade*, for the production of the Title Deeds; and that when such Deed of Covenant was obtained, the Plaintiffs would then be enabled to deliver to the Defendant all such muniments and writings as the De-

1823.

BARCLAY
v.
RAINE.

Defendant appeared to be entitled to receive upon the completion of his Purchase. The *Master*, therefore, submitted to the consideration of the Court whether, without such a Deed of Covenant from Messrs. *James* and *John Slade*, the Defendant ought to be called upon to complete his Purchase?

A motion was now made, on behalf of the Plaintiffs, that the Defendant might be ordered to pay his Purchase Money into Court. This Motion was made with the view of obtaining the opinion of the Court on the facts submitted by the *Master*.

Mr. Bell, and *Mr. Richmond*, for the Motion:—

Although the original Deed of Covenant has been lost, yet the Purchaser has a Covenant from the Party who has now the custody of the Title Deeds to produce them so long as they remain in his Possession. Although the Mortgagor of the other part of the Estate has not joined in this Covenant, nor given any other Covenant to produce the Title Deeds, yet the Purchaser from the Plaintiff would have an equitable right to compel the Mortgagor to produce the Title Deeds. There is sufficient evidence of the existence of the Title Deeds, and of their relating to the Estate in question in this Cause. In *Shore v. Collett* (a), where the doctrine of the right to possession of Title Deeds was carried very far, Lord *Eldon* seems to have considered that a Purchaser, in such a Case as the present, would have a right, in Equity, to compel the Owner of the other part of the Estate, who was in possession of the whole Estate, to produce the Title Deeds.

(a) Coop. 234.

The expression used by Lord *Eldon* in *Dare v. Tucker* (b), as to attested Copies of Deeds being mere waste paper, must be considered as applying only to the inefficacy of attested Copies as evidence in Ejectment. It was decided in *Townsend v. Ash* (c), that a Party who has not established his Title at Law can by Bill in Equity compel the production of a Deed at all Trials at Law, and is entitled to have attested Copies of it. A Covenant to produce Title Deeds is merely corroborative of the right in Equity to compel the Party who has the custody of the Deeds to produce them. This right to production was recognized in *Buckhurst's Case* (d), and in *Banbury v. Briscoe* (e). The principle is, that wherever two Parties claim under the same Title Deeds, the Party who has the custody of the Deeds can be compelled to produce them, to defend the Title of the other Party. In *Banbury v. Briscoe*, where two Parties claimed under one Deed, the Court ordered the Deed to be delivered into Court, in order that both Parties might have access to it, and might take copies of it. It must be admitted that this right to compel the production of Title Deeds can be exercised only where the Party requiring the production shows a clear Title, which is not adverse to that of the Party in possession of the Deeds; but, subject to that qualification, the right is clear. *Amey v. Long* (f), *King v. King* (g).

1823.

BARCLAY
v.
RAINE.

Mr. Sugden, for the Defendant:—

The rule as to Covenants for the production of Title Deeds is, that they run with the Land for the benefit of Purchasers necessarily, but not for the benefit of Vendors. No Purchaser can be compelled to take a

(b) 6 Ves. 460.

(c) 3 Atk. 336.

(d) 1 Co. 1.

(e) 2 Ch. Ca. 42.

(f) 9 East, 473.

(g) 4 Taunt. 666.

1853.

BARCLAY
v.
RAINE.

Title unless he gets either the Title Deeds, or documents which enable him to obtain the production of the Deeds. In the present Case, the Purchaser has neither the Deeds, nor any document to enable him to compel the production of them. The Plaintiffs never had any legal Covenant for the production of the Deeds. Mr. *Barclay* completed his Purchase without taking any legal Covenant for the production of the Deeds, and the Plaintiffs claim through him. As to the general principle which has been insisted upon on behalf of the Plaintiffs, and according to which it is contended that there is an equity by which every Party who claims through Title Deeds which relate also to Property belonging to another Party who has the custody of the Deeds, can compel the Party who has the custody of the Deeds to produce them, it is a doctrine entirely new. And even if there be any expressions in the Books to countenance such a doctrine, there is certainly no Case in practice in which a Purchaser was ever advised to take a Title, relying on such general equity, without any actual Covenant for the production of the Deeds. There are, indeed, Cases in which a Covenant is taken to produce a Covenant for the production of the Title Deeds. But if a man chooses to buy an Estate without having possession of the Title Deeds, or any Covenant with himself for the production of them, it can hardly be expected that a Court of Equity will compel any person who has agreed to Purchase from him, without having any notice of the situation of the Title Deeds, to complete his Purchase without a legal Covenant for the production of the Title Deeds.

The VICE-CHANCELLOR :—

A Court of Equity never compels a Purchaser to take without the Title Deeds, unless he has a Covenant to

produce them; and a right in Equity to compel the production of the Deeds, even if it existed, would be no answer. But the Equity of the Purchaser, in the present Case, would be highly questionable. *Thring's* Covenant to produce does not run with the Land; nor is it pretended that *Slade* had notice of that Covenant: and *Slade*, like every other Proprietor, has a material Interest against the exposure of his Title Deeds.

1823.

BARCLAY
v.
RAINE.

Motion refused.

The Bill was dismissed, with Costs.

Reg. Lib. A. 1822, fol. 2000.

BRASSINGTON v. BRASSINGTON.

THE Bill in this Cause was filed by *Martha Brassington* against her Husband, *William Brassington*, to enforce a Settlement made by him in her favour, in contemplation of their Marriage. The Cause being at Issue, a Commission had issued for the examination of Witnesses.

The Deed of Settlement was in the possession of one *Williams*, who was Solicitor to the Executrix of *William Harding*, the Solicitor who had prepared the Settlement. *Williams* was served with a *subpœna duces tecum*, to appear as a Witness on behalf of the Plaintiff, and produce the Deed. He appeared before the Commissioners accordingly, and acknowledged that he had the Deed in his custody, and exhibited it to the Commissioners, but refused to allow it to be proved and given

1823.

27th May.

Solicitor's Lien.
Witness.

A Solicitor, who refused to allow a Deed in his possession to be proved on behalf of the Plaintiff, because he had a Lien on it for Costs due from the Defendant, was ordered to produce the Deed at his own expense, and to pay all the Costs consequent on his refusal.

Hopwood & Co. 19th Nov. 1865

Brassington v. B. 3d Ser.
285

1893.

BRASSINGTON
v.
BRASSINGTON.

in evidence; alleging, as a reason for his refusal, that he held the Deed only as the Solicitor of *Harding's* Executrix, who claimed a Lien in respect of Costs due by the Defendant *Brassington*.

The Court was now moved, on behalf of the Plaintiff, that *Williams* might be ordered, at his own expense, to produce the Deed at the Examiner's Office, and to pay all the Costs occasioned by his refusal.

The Certificate of the Commissioners before whom *Williams* had appeared, was read in support of the Motion. It stated the refusal of *Williams*, and the reason which he alleged for it; also, that the acting Executor of *Harding* had attended to prove the execution of the Deed, but was prevented by the refusal of *Williams* to allow it to be given in evidence.

Mr. *Rose*, for the Motion, insisted that the *subpoena duces tecum* was compulsory as to the production of the Deed, for the purpose of its being given in evidence. It has been expressly laid down by Lord *Eldon*, that a Solicitor cannot, by virtue of his Lien, prevent the King's subject from obtaining justice. *Commerell v. Poynton* (a), *Ross v. Laughton* (b).

Mr. *Pemberton*, on behalf of *Williams*, opposed the Motion. This is the Case of the Representative of a deceased Solicitor, who insists on his right to retain this Deed against all the World till his demand in respect of Costs is satisfied. The utmost length to which the Court has gone in Cases where such a Lien has been claimed is, that where Deeds have been depo-

(a) 1 Swan. 1.

(b) 1 V. & B. 349.

sited in the hands of a Solicitor in the progress of a Suit, the Court, notwithstanding the Lien, will compel the Solicitor to produce the Deeds for the purposes of that Suit. But the present is a different Case. The Lien of the Solicitor is in respect of the Costs of preparing the Deed under which the Plaintiff claims; so that he may be considered as having a claim against both the Husband and Wife. The purpose for which it is sought to compel the production of this Deed would entirely destroy the Lien.

1823.

BRASSINGTON
v.
BRASSINGTON.

The VICE-CHANCELLOR:—

It would be very extraordinary if a Deed by which Property is conveyed were to be of no effect, because the Party who executed the Deed did not choose to pay his Solicitor's Bill. It may be reasonable that the Husband, if calling for the Deed for his own purposes, should not have access to it until the Solicitor's claim was satisfied; but to refuse to produce it as a Witness for the other Party cannot be justified. I shall order the Deed to be produced, and the Witness to pay all the Costs occasioned by his refusal (c).

“ This Court doth order, that the said *John E. Williams* do attend and produce, at his own expense, before *J. N. Dancer*, one of the Examiners of this Court, at the Examiner's Office, when he shall appoint, the Marriage Settlement of *William Brassington* and *Martha* his Wife, dated the 7th of December 1807. And it is

(c) Under a *Subpoena duces tecum* the Party may, in Court, object to produce the Documents; but if the objection is overruled, production will be compelled. Per Lord Eldon, *Field v. Beaumont*, 1 Swanst. 209.

1823.

BRASSINGTON
v.
BRASSINGTON.

ordered, that the subscribing Witness, or one of the subscribing Witnesses, to the said Deed do attend before the said Examiner at the time and place aforesaid, at the expense of the said *J. E. Williams*; and that the said *J. E. Williams* do pay the Costs of preparing and filing Interrogatories consequent on this Application, and also the Costs of this Application, and incident thereto, to be taxed by Mr. *Alexander*, one of the *Masters* of this Court."

Reg. Lib. A. 1822, fol. 1331.

1823.

13th March
and
16th July.

Retainer.
Devisee.

A Devisee
has a right to
retain a Debt due
to himself, or to
his Trustees, out
of the Produce
of the Estate
devised to him.

LOOMES v. STOTHERD.

THE Plaintiff was the personal Representative of *Robert Loomes*, and the Defendant was the Executrix and Devisee of all the Real Estates of *John Richard Stotherd*, her late Husband. The object of the Bill was, to have certain specialty Debts, due from *Stotherd* to *Loomes's* Estate, paid out of the Real and Personal Assets of the former.

- The *Master* had reported that 1,674*l.* 3*s.* 9*d.* were due from *Stotherd's* Estate to the Trustees of his Marriage Settlement, upon a Bond for securing 2,500*l.* for the benefit of the Defendant and her Children. *Stotherd's* Personal Estate being insufficient to pay his Debts, the Defendant claimed to retain the 1,674*l.* 3*s.* 9*d.* out of the Money to be produced by Sale of his Real Estates, before the Plaintiff's demands were satisfied; and, on the Cause coming on for further directions, the question was, whether she had any such right of Retainer.

Mr. *Hart*, and Mr. *Wakefield*, for the Plaintiff:—

Although it is settled that an Executor has a right to retain for his own Debt, the Heir has no such right. *Shetelworth v. Nevile* (a). But admitting that the Heir is entitled to retain, it would not follow that this Defendant had the same right; for she is not the Heir, but the Devisee; and she takes the Estate subject to the payment of Debts. The reason for allowing an Executor to retain is, that he cannot sue himself. But here the Debt is not due to this Defendant, but to a third person; and therefore the principle does not apply. And it appears from the Case of *Wilson v. Knubley* (b), that the Statute (c) places the Heir and Devisee in different situations, and under different obligations. Suppose the Plaintiff had brought an Action at Law against the Defendant, what plea could the latter have pleaded? Could she have pleaded that the Testator was indebted by Bond to her Trustee, and that she was entitled to retain the Debt? She never could interpose her power of retainer against the power given by the Statute (c). If, then, there is no retainer at Law, and the Heir or Devisee comes into a Court of Equity to assert his right, it would be contrary to the principles of such a Court to give him a preference over all the other Creditors. The utmost that a Court of Equity would decree would be, a rateable satisfaction with the other Creditors.

1823.
LOOMES
v.
STOTHERD.

Mr. *Bell*, and Mr. *Garratt*, for the Defendant:—

An Executor may not only retain for a Debt due to himself, but also for a Debt due to his Trustee. *Loane*

(a) 1 T. R. 454.

(b) 7 East, 128.

(c) 3 W. & M. c. 14.

1823.

LOOMES
v.
STOTHERD.

v. *Casey* (d), *Franks v. Cooper* (e). And an Heir at Law can no more bring an Action against himself than an Executor can; and therefore he may plead retainer for his own Debt, in an Action brought against him to recover a Debt due from his Ancestor (f). The Statute of Fraudulent Devises enacts (g), that, in all cases where any Heir at Law shall be liable to pay the Debt of his Ancestor in regard of any Lands, Tenements or Hereditaments descending to him, and shall sell, alien or make over the same before any Action brought, or Process sued out against him, such Heir at Law shall be answerable for such Debt or Debts in an Action or Actions of Debt, to the value of the said Land so by him sold, aliened or made over; in which cases all Creditors shall be preferred, as in Actions against Executors and Administrators, and such Execution shall be taken out upon any Judgment or Judgments so obtained against such Heir, to the value of the said Land, as if the same were his own proper Debt or Debts, saving that the Lands, Tenements and Hereditaments *bonâ fide* aliened before the Action brought shall not be liable to such Execution. What is intended by this section is, that, if the Heir aliens before the Action brought, he shall have the same preference as an Executor is entitled to; so that the right of retainer by the Heir is acknowledged by this Statute. And the seventh section enacts, that all and every Devisee and Devisees made liable by this Act, shall be liable and chargeable in the same manner as the Heir at Law by force of this Act, notwithstanding the Lands, Tenements and Hereditaments to him or them devised shall be aliened before

(d) 2 Black. 965.

(e) 4 Ves. 763.

(f) Com. Dig. tit. Pleader, 2 E. III. and 2 Vern. 62.

(g) 3 W. & M. c. 14, sect. 5.

the Action brought. So that the Statute gives the same remedy against the Devisee as against the Heir, and places the former in the same situation as the latter. The circumstance that this Defendant is not the Trustee, but the *cestui que Trust* of this Debt, cannot make any difference in a Court of Equity.

1823.

 LOOMES
 v.
 STOTHERD.

The VICE-CHANCELLOR:—

At Common Law an Heir could retain for his own specialty Debt: so a Devisee, under the Statute, must have the same right as an Heir. An Executor may retain his own Debt, or the Debt of his Trustee; and, therefore, a Devisee may retain for his own specialty Debt, or the Debt of his Trustee; and, if the Devisee be also the Executor of a deceased Creditor, he may first retain for his own Debt, and next for the Debt of his Testator. But the Devisee cannot retain his Debt in priority to the Costs of the Suit. Because the Costs of the Suit are to be considered as expenses in administering the Estate, and are the first charge upon an Estate, whether administered in or out of Court. But if a Devisee states in his Answer that his right of retainer will exceed the Assets, after such notice the Plaintiff may be considered as proceeding at the peril of Costs.

1823.
22d July.

Costs.

The Plaintiff
in an Interplead-
ing Suit is en-
titled to be paid
his Costs out of
the Fund.

CAMPBELL v. SOLOMANS.

THIS was a Bill of Interpleader respecting certain sums of Money in the Plaintiff's hands. On the Cause coming on to be heard for further directions, and as to Costs,—

The *Vice-Chancellor* ruled, that a Plaintiff in an Interpleading Suit is entitled to have his Costs out of the Fund which is the subject of the Suit, and is not to take his chance of getting them from the Defendant, against whose claim the Court decides.

Reg. Lib. A. 1822, fol. 2249.

May v Bennett 1 Rep. 370

DAVIES v. WATTIER.

1823.
28th July.

Annuity.

JOHN BEARD, by his Will, gave to his Wife, *Lydia Beard*, 200*l.* a year, to be paid to her by his Executors, out of his Personal Estate not specifically bequeathed, during her Life; and he gave to the Defendants, *Wattier, Goldicutt and Thomson*, all his Personal Estate not specifically bequeathed, in Trust to sell and dispose of the same, and the produce of such Sale to invest in the public Funds, in their names, and out of the Dividends to pay, in the first place, the Annuity of 200*l.*; and he directed them to divide the residue of the Dividends equally between such of his Nephews and Nieces as should be living at his decease; and, after his Wife's decease, to transfer to such of his Nephews and Nieces as should be then living, all the Stock which should be standing in his Trustees names: and he appointed *Wattier, Goldicutt and Thomson*, Executors of his Will.

A Testator having directed an Annuity to be paid out of his Personal Estate, a sum of five per cent. Stock was, in the course of the Cause, ordered to be set apart to answer the Annuity. This Fund having become insufficient for the purpose, by the conversion of the five per cents. into four per cents. the deficiency was directed to be supplied out of another Fund, to which other Persons interested in the Residue had been declared to be entitled.

By the Decree made on the hearing of this Cause, the Executors were ordered to transfer 4,000*l.* Navy five per cent. Annuities, and 5,300*l.* Bank three per cent. Annuities, admitted by their Answer to be standing in their names, into the name of the Accountant General, in Trust in this Cause; and, out of the Dividends to accrue on the former of those sums, it was ordered that the Annuity of 200*l.* should be paid from time to time, to the Testator's Widow, during her Life. In July following, the Executors, in obedience to the Decree, transferred the two Sums of Stock into the Accountant General's name.

1823.

DAVIES
v.
WATTIER.

On the hearing of the Cause for further directions, the rights and interests of some of the other Parties to the Suit in a sum of 4,849*l.* 14*s.* 8*d.* (a) Bank three per cent. Annuities standing in the Accountant General's name, in Trust in the Cause, were declared, and the Dividends of that Sum were directed to be paid to them accordingly.

By 3d Geo. 4. c. 9, for the conversion of 5*l.* per cent. Stock into new four per cents. the 4,000*l.* Navy five per cents. were converted into 4,200*l.* new four per cents. The Dividends of this last mentioned Sum being insufficient to pay the Annuity of 200*l.* Mrs. *Beard* presented a Petition in the Cause, praying that the Accountant General might be ordered to pay to her a sum of Cash which was then in his hands, being the Dividends accrued on the 4,200*l.* new four per cents. and also so much of the Dividends which had arisen, or might thereafter arise, from the 4,211*l.* 12*s.* 3*d.* (b) three per cents. then standing in the Accountant General's name, in Trust in the Cause, as would, with the sum of Cash, be sufficient to pay the half yearly payment of her Annuity then due to her; and also, out of the Dividends of those two sums of Stock, to pay the Annuity to her, from time to time, during her Life.

Mr. *Rose*, for the Petitioner.

(a) This sum (although it was not so stated in the Petition) was the residue of the 5,300*l.* Bank three per cent. Annuities, after the Costs of the Suit, down to the time of making the Decree, had been raised and paid thereout.

(b) This was the remainder of the 4,849*l.* 14*s.* 8*d.* after payment of the Costs of the Suit, down to the time of the Decree on further directions.

Mr. *Bell*, and Mr. *Wilbraham*, for the other persons interested in the residue of the Personal Estate, contended that the Petitioner was not entitled to have the deficiency of the Fund, which had been set apart for payment of her Annuity, supplied out of any other Fund in the Cause; because she had consented to the 4,000*l.* five per cents. being appropriated for securing her Annuity; and that she must, therefore, abide by the loss occasioned by the conversion of the five per cents.

1823.
DAVIES v.
WATTIER.

The *Vice-Chancellor* said, that the appropriation of the 4,000*l.* five per cents. was not the act of the Petitioner, but was the act of the Court; and that, as the Annuity was a charge upon the whole of the Residue, the Petitioner was entitled to have the deficiency, which had been occasioned by the conversion of the Stock, supplied out of the other Funds in the Cause; and he made an Order according to the Prayer of the Petition.

Reg. Lib. A. 1822. fol. 2315.

1823.
27th and 30th
May.

PARTRIDGE v. CANN.

Practice.

A Cause may be regularly set down, without Consent, in the Vacation after the Term in which Publication passes.

THE Rule to pass Publication in this Cause expired on the 12th of *May*, which was the last day of *Easter Term*. A few days afterwards, during the vacation after the Term, the Plaintiff obtained the Six Clerks Certificate that Publication had passed, and obtained also the usual Order for setting down the Cause, and served the subpoena to hear Judgment.

The Court was now moved, on behalf of the Defendant, that the subpoena to hear Judgment might be discharged, with Costs, and the Cause struck out of the Register's Book for irregularity.

Mr. *J. Martin*, for the Motion, relied on the Case of *Lord v. Genslin* (a), which decided that a Cause cannot be set down in the same Term in which Publication passed; and insisted, that the short vacation after *Easter Term* must be considered as part of the Term; and that the same inconveniences, which it was intended to prevent by not allowing the Cause to be set down during the Term in which Publication passed, would happen by allowing the Cause to be set down during the short vacation after the Term.

Mr. *Beames*, for the Plaintiff, opposed the Motion, and cited 1 *Turner's Prac.* 92, ed. 1810, and *Gilbert For. Roman.* 152.

The *Vice-Chancellor* observed, that the reason why a Cause cannot be set down to be heard in the Term

(a) 5 Madd. 83.

in which Publication passes, unless by consent, was, that it might come on to be heard during that same Term, and when the Defendant could not conveniently be prepared; but that that reason did not seem to apply to setting down the Cause during the vacation after the Term.

1823.
PARTRIDGE
v.
CANN.

The Motion was ordered to stand over, that the Practice might be inquired into.

The *Vice-Chancellor* said, the Register, upon inquiry, 30th May- found that a Cause might be regularly set down, without consent, in the vacation after any Term in which Publication had passed.

Motion refused, with Costs.

PIGGOTT v. CROXHALL.

THIS was a Motion on behalf of the Plaintiffs, for liberty to exhibit Interrogatories for the examination of Witnesses in support of Articles which had been exhibited in the Six Clerk's Office, to discredit some of the Defendant's Witnesses; on the ground that, previous to their examination, they had made declarations contrary to their depositions.

1823.
14th June.

Practice.
Articles to discredit
Witnesses.

There is no precise time beyond which Witnesses cannot be discredited.

Mr. *Russell*, in support of the Motion, cited *Purcell v. Macnamara* (a), *Wood v. Hammerton* (b), *Carlos v. Brook* (c), *White v. Fussell* (d), *Russell v. Atkinson* (e), and *Watmore v. Dickinson* (f).

Interrogatories in support of Articles for that purpose may relate to particular facts not in issue in the Cause, as well as to the Credit of the Witnesses generally.

- (a) 8 Ves. 324. (b) 9 Ves. 145. (c) 10 Ves. 49.
(d) 19 Ves. 127. (e) 2 Dick. 532. (f) 2 V. & B. 267.

1823.

PIGGOTT
v.
CROXHALL.

Mr. *Lynch*, *contrà*, said, that the depositions had been published so long ago as last *Michaelmas* Term, and that the Court would not allow these Interrogatories to be exhibited after so much delay had taken place. He also contended, that the object of the Plaintiffs was to re-examine as to matters in issue in the Cause, which was not allowable; and he cited *Gill v. Watson* (g), and *Anon.* (h).

The VICE-CHANCELLOR:—

There is no precise time within which the examination as to Credit is to take place. The Court will take care that the hearing of the Cause is not unreasonably delayed; and no such delay will be occasioned here. I incline to think that the Party may prove that the Witnesses made the declarations which they denied upon their cross-examination; and that the fact of these declarations is not material to the issue in the Cause.

Let him take the usual Order to examine, by general Interrogatories, as to the credit of the Witnesses, and upon such particular facts only as are not material to what is in issue in the Cause. If he examine to other facts, the Defendants must move to suppress the depositions.

Reg. Lib. B. 1822, fol. 1278.

(g) 3 Atk. 522.

(h) 3 V. & B. 93.

TRIM v. BAKER.

THE Defendants had demurred to the Bill. On the 11th of this month the Demurrer came on to be argued, and was over-ruled. Five days afterwards an Order was obtained, *upon a Motion of course*, that three of the Defendants should have a month's time, and the other Defendants, who lived above twenty miles from *London*, six weeks time, to answer the Bill.

1823.
28th June.

Practice.

After a Demurrer over-ruled, an Order for Time to answer merely can be obtained by a special Application only.

Mr. Romilly, for the Plaintiff, now moved that that Order might be discharged for irregularity, with Costs. He said that, after a Demurrer over-ruled, an Order for time to answer could not be obtained upon a Motion of course, but that a special Application must be made for it; and he cited *Jones v. Sarby (a)*.

Mr. Lovat, for the Defendants:—

The Case cited for the Plaintiff has no application; for there the Order was for time to plead, answer or demur, not demurring alone; and the Order was discharged, because a Defendant is not at liberty to put in a second Demurrer without the leave of the Court. Here the Order is for time to answer only. In *Griffith v. Wood (b)*, an Order for a month's time to plead or answer, after a Demurrer over-ruled, was made upon a Motion of course. And it is laid down by Mr. Maddock, upon the authority of an Anonymous Case of the 30th June 1807 (c), that a Defendant, after Demurrer over-ruled, is entitled to the usual Orders for time to answer.

(a) 1 Swan. 194, n.

(b) 1 V. & B. 541.

(c) 2 Prin. & Prac. 263.

1823.

TRIM

v.

BAKER.

Suppose there were only one or two Interrogatories in the Bill which the Defendant could be compelled to answer, he might, if a special Application was necessary, be forced to make a discovery which would subject him to Penalties. His situation may be such that he cannot make a special Application; and then he would be immediately subject to process of Contempt. I submit, therefore, that, upon principle as well as authority, this Order is proper

The *Vice-Chancellor* said that, after a Demurrer had been over-ruled, it was not of course to obtain an Order for time even to answer only; but that it must be made the subject of a special Application: and he discharged the Order, with Costs (d).

Reg. Lib. B. 1822, fol. 1223.

(d) The usual practice is, to apply for an Order for time to answer immediately after the Demurrer has been over-ruled: and the Court will grant the application in the Vacation, as well as in Term time. *Adderley v. Dixon*, 16 January 1824.

HARRISON v. HOLLINS (a).

1812.
24th February.

Equity of Redemption.

BY an Indenture, dated the 28th of May 1761, and made between *Randle Harrison*, of the first part; *William Harrison*, of the second part; and *Nathaniel Hall*, and *Sarah Hall*, his Wife, and *Margaret Hall*, Spinster, of the third part; *Nathaniel Hall*, for the love and affection which he had for *Margaret Hall*, his Daughter, and in consideration of an intended Marriage between her and *William Harrison*, did, for himself, his Heirs, Executors and Administrators, covenant with *William Harrison*, his Heirs, Executors, Administrators and Assigns, that, in case the Marriage should take effect, he would, by proper Conveyances and Assurances in the Law, or by his last Will and Testament in writing, settle and give all such Personal and Real Estate as he then was, or at the time of his death should be seised or possessed of, or anywise entitled unto, or have any power to dispose of, (subject to the maintenance and subsistence thereout, during his life, of himself, his Wife and Family, and also subject to and after payment of his just Debts and Funeral Expenses), so that the same respectively should, from and after his decease, go and remain to the uses and for the purposes therein

If a Mortgagee enters in the lifetime of the Tenant for Life of the mortgaged Estate, the Remainderman will be barred of his right to redeem after twenty years from such Entry.

(a) This Case is mentioned, *ante*, p. 344, as having been cited from a MS. Note in the possession of Mr. Shadwell. As that Note is a very short one, and as the Register's Book merely contains the Order for dismissing the Bill, we thought it would not be unacceptable to the Profession to be furnished with a full statement of the Case; which we have been enabled to give from the Pleadings, by the kindness of the Solicitor who was employed for the Plaintiffs in the Cause.

1812.

HARRISON
v.
HOLLINS.

and hereinafter mentioned concerning the same; (that is to say), to the intent that the clear Rents and Profits, Interest and Produce, of so much of such Real and Personal Estate, as should remain after what should have been applied for the purposes aforesaid, should and might be received by *William Harrison* for so long as he, after the decease of *Nathaniel Hall*, should happen to live; and after his decease, then by *Margaret Hall*, for so long as she should thenceforth happen to live; and after the decease of the survivor of them, to the intent that all such residuary Real and Personal Estate should go and be enjoyed by all and every such one or more of the Children of the said *William Harrison*, on the body of the said *Margaret*, his intended Wife, to be begotten, and in such parts and proportions, manner and form, as *Margaret Hall*, notwithstanding her Coverture, by any writing or writings executed by her as therein mentioned, or any writing purporting to be her last Will and Testament, to be by her signed, sealed and published as therein mentioned, should direct or appoint.

The Marriage between *William Harrison* and *Margaret Hall* took effect soon after the execution of the Settlement. There was Issue of the Marriage *Randle Harrison*, and the Plaintiffs *Eli Harrison* and *Ann Gent*.

In April 1764, *Nathaniel Hall* agreed to purchase a Farm at *Lowe*, in the Parish of *Leek*, in *Staffordshire*, for 880*l.*; but not having sufficient Money to pay for it, he borrowed 600*l.* of *Richard Dale* for that purpose. And by Indentures of Lease and Release, dated the 4th and 5th days of April 1764, the Farm was, by *Hall's* direction, mortgaged to *Dale* in Fee, for securing the

600*l.* and Interest. *Hall's* Real Estates were never conveyed to the Trustees of the Settlement.

1812.

HARRISON
v.
HOLLINS.

In 1768 *Dale*, by *Hall's* direction, conveyed the Farm to one *Dickenson*, for securing a sum of Money, the amount of which was not stated in the Pleadings.

Hall survived his Wife, and died in 1770 intestate, and in possession of the Farm, leaving *Margaret Harrison* his only Child. Upon *Hall's* death *Harrison* entered into the possession of the Farm. In May 1772 *Dickenson*, by the direction of Mr. and Mrs. *Harrison*, conveyed the Farm to *Thos. Harwar*, in Trust for *Esther Gallimore*, to secure 1,000*l.* and Interest. *Esther Gallimore* afterwards died, having appointed *Thomas Harwar* her Executor; and in 1779 he entered into the possession of the Farm under the Conveyance of May 1772.

Margaret Harrison, by her Will, dated the 29th of March 1793, and (which was executed pursuant to the power given to her by the Settlement) after reciting that she was enabled by the Settlement to make a Will of her Real Estate and Effects, did, by virtue of the Settlement, give and devise the Farm to *Randle Harrison*, and the Plaintiff *Eli Harrison*, and their Heirs, equally, share and share alike, subject to the payment of an Annuity of 20*l.* to the Plaintiff *Ann Gent*, for her life.

Randle Harrison died in his Father's lifetime, having devised the whole of his Real Estates to the Plaintiffs, *Eli Harrison* and *Ann Gent*, in Fee. In April 1804 *William Harrison* died.

In 1795 *Thomas Harwar* died; and, upon his decease, *Joseph Harwar* entered into the possession of the Farm as *Thomas Harwar's* Heir at Law.

1812.
HARRISON
v.
HOLLINS.

Joseph Harwar afterwards died, having devised all his Real Estates in the County of *Stafford* to the Defendants *Faulkener* and *Vaudrey* in Fee; and having appointed them and his Brother, *Charles Harwar*, his Executors. *Faulkener* and *Vaudrey* entered into possession of the Farm upon *Joseph Harwar's* decease, and had ever since continued in possession thereof.

The Bill was filed in April 1809; and it prayed that the Plaintiffs might be at liberty to redeem the mortgaged Premises, and that the usual Accounts might be taken of the Principal and Interest due on the Mortgage, and of the Rents and Profits received by *Thomas Harwar* and those who claimed under him.

The Defendants, *Faulkener* and *Vaudrey*, in their Answer, said, that they, and *Thomas Harwar* and *Joseph Harwar* had been in peaceable possession of the Premises from the year 1779, being a period of thirty years and upwards, and had not, during that time, to their knowledge or belief, been called on to account for the Rents and Profits of the mortgaged Premises by any Person claiming to be entitled to the Equity of Redemption thereof, until the filing of the Bill, or a short time previous thereto; and therefore they submitted, that they ought not to be compelled, at such a distance of time, to set forth any account of the Rents and Profits received by them from the mortgaged Premises, but that the Plaintiffs were, by length of time, barred from redeeming the mortgaged Premises.

John Hollins, and *William Hollins*, the other Defendants, were interested in the Premises under a Mortgage made by *Thomas Harwar* in 1784, for securing 500*l.*, which he had borrowed as the Executor of *Mrs. Gallimore*.

" Monday, 24th February 1812."

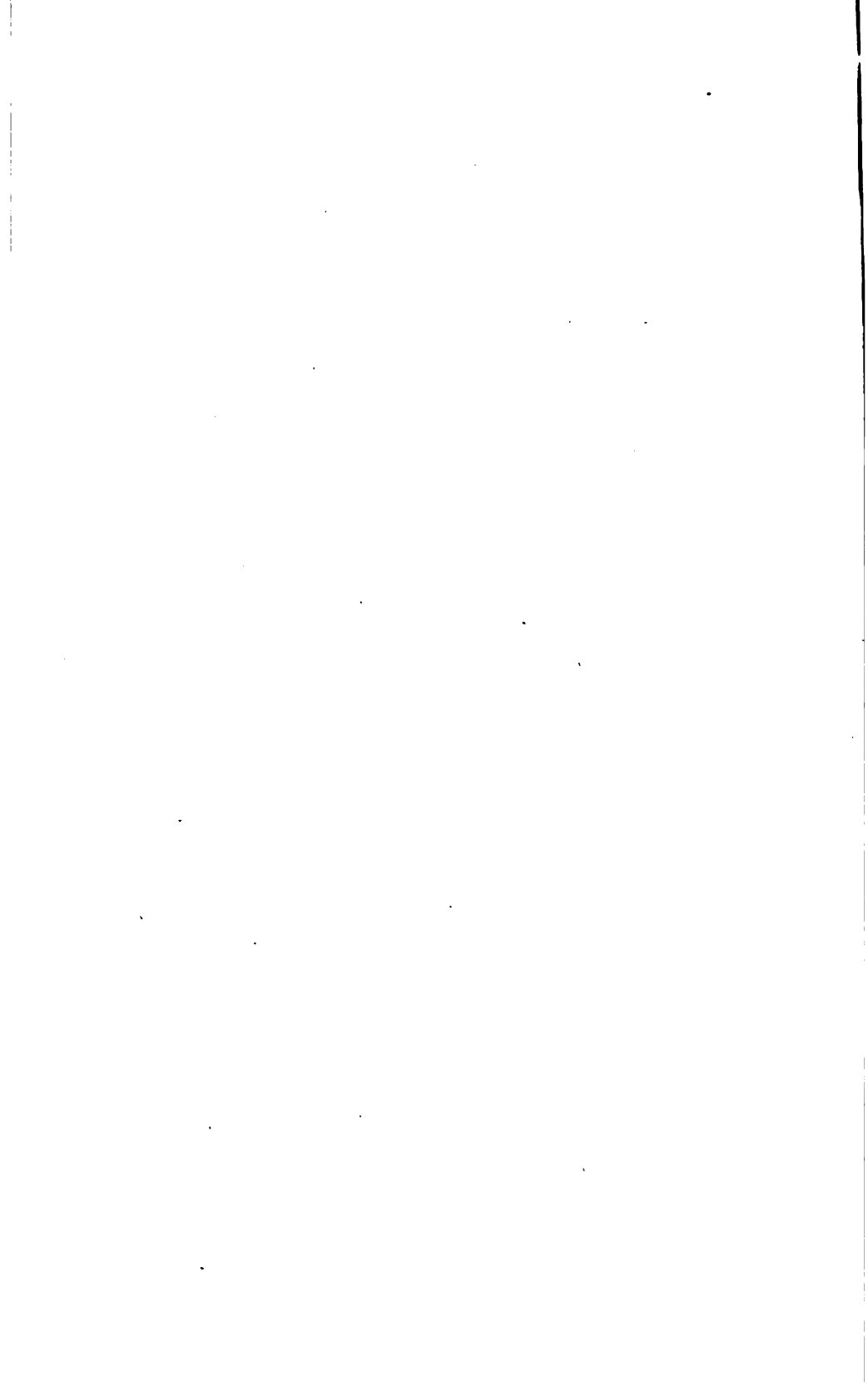
1812.

" This Cause coming on on the 1sth and 12th days of December 1811, and on this present day to be heard before the Right Honourable the *Master of the Rolls*, in the presence, &c. His *Honor* doth order, that the Plaintiffs' Bill do stand dismissed out of this Court, with Costs, to be taxed, &c."

HARRISON
v.
HOLLINS.

Reg. Lib. A. 1811, fol. 374.

END OF PART III.



CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

TROLLOPE v. LINTON.

1823.
10th & 11th Nov.

*Power.
Settlement.*

BY Articles of Agreement, dated the 24th of March, 1798, made previous to the Marriage of Sir John Trollope with Miss Ann Thorold, it was covenanted that the real Estates of that Lady should be settled, in

By Articles
for Settlement of
the Wife's Real
and Leasehold

Estates, the Husband had power to appoint her Estates to the Children of the Marriage, for such Estates, and in such parts, and in such manner and form as he should by Deed or Will appoint: and, by other Articles of the same date, for the Settlement of his own Real Estates, he had an absolute Power of Appointment over them by Deed or Will, in default of Issue of the Marriage. There being several Children of the Marriage, and no Settlement pursuant to the Articles, the Husband, (who died in the lifetime of the Wife,) by his Will, recited the Articles for the Settlement of his own Estates, and confirmed them, and recited the Power of Appointment in them at length, mentioning it as a Power intended to be exercised by that his Will; and thereby, in exercise of that Power, and all other Powers, appointed his own Real Estates, and all other Real Estates over which he had Power, to Trustees for a term of 500 years, upon Trust, to raise portions for his younger Children, making no mention, in any part of his Will, of the Articles for Settlement of his Wife's Estate; but directing, that all persons taking any benefit under his Will should be bound by the doctrine of election to give effect to every disposition contained in it. Held, that the Will operated as an Appointment of the Wife's Real Estates; and that the creation of

1823.

TROLLOPE
v.
LINTON.

consideration of the Marriage, to the use of *Henry Thorold*, her Father, for his life; with Remainder to Trustees to preserve contingent Remainders; with Remainder to Sir *John Trollope* for his life; with Remainder to Trustees to preserve contingent Remainders; with Remainder to Miss *Thorold* for her life; with Remainder to Trustees to preserve contingent Remainders; with Remainder to the use of such one or more of the Children of Sir *John Trollope* on her body to be begotten, for such Estate or Estates, in such parts, shares and proportions, and in such manner and form, as Sir *John Trollope*, by Deed or Will, should direct or appoint; and, in default of appointment, to the Children equally as Tenants in common in tail, with Cross-remainders in tail; with Remainder to such uses as Miss *Thorold* should in manner therein mentioned appoint; and, in default of such appointment, to Sir *John Trollope*, his Heirs and Assigns. It was also covenanted that certain Leasehold Estates, to which Miss *Thorold* was entitled, should be settled to the same uses, so far as the rules of Law and Equity would admit.

By other Articles of Agreement of the same date, and made on the same occasion, it was covenanted, that in case the Marriage should take effect, the Real Estates of Sir *John Trollope* should be settled and conveyed to Trustees, to the use of Sir *John Trollope* for his life;

the term of 500 years was a good execution of a Power to appoint for such Estates as the Appointor should think fit; and that the words "in such manner and form" authorized him to give equitable Interests to the Children.

Articles of Settlement of the Chattels Real of an Infant on her Marriage, will bind her and her Husband; and, although no Settlement be made pursuant to the Articles, the Wife is not entitled to any Interest by survivorship.

2 m & 6
230

1823.

TROLLOPE
v.
LINTON.

with Remainder to Trustees to preserve contingent Remainders; and, after the decease of Sir *John Trollope*, to the intent that his intended Wife should receive a Rentcharge for her Jointure in bar of Dower; with a Limitation to Trustees for a term of ninety-nine years, upon Trust to secure this Jointure, and subject thereto to the use of the first and other Sons of the Marriage in tail male; and, for default of such Issue, to the use of such Person or Persons, for such Estate and Estates, and in such parts and proportions, and for such intents and purposes, and in such manner and form, as Sir *John Trollope* should, by Deed or Will, appoint; and, in default of appointment, to *William Trollope*, his Brother, in tail; with the ultimate Remainder to Sir *John Trollope*, his Heirs and Assigns.

Soon after the execution of these Articles of Agreement, the Marriage between Sir *John Trollope* and Miss *Thorold* took place. Miss *Thorold* was then an Infant; but her Father was a Party to the Articles. No Settlement was executed pursuant to the Articles. Sir *John Trollope* by his Will, dated the 24th of March 1809, directed that the Trustees named in his Will should permit his Wife personally, with her own Family, to occupy the Mansion-house on his Estate, during her life, or until some one of his Sons should attain the age of twenty-one; and, after reciting the Articles for the Settlement of his own Estates and the Power of Appointment thereby reserved to him, which he described as "a Power intended to be exercised by this my Will;" and also reciting "that no Settlement had been made pursuant to the said Agreement;" he thereby expressly confirmed the Agreement, and directed that it should be performed. He then, (without mentioning in any part of the Will the Articles of

1823.

TROLLOPE

v.

LINTON.

the Will does not mention these Articles, the words in the Will, "all other the Manors, &c. belonging to me, or over which I have a Power of Appointment," are mere general words, and can never be understood to extend to Property over which the Testator had no Power of Appointment, except among his Children. The nature of the Appointment too is quite inconsistent with the Power in the Articles for settling Lady *Trollope's* Estates, because he appoints the Estates, subject to the term of 500 years, to go according to the limitations in the Articles of the 24th of March, 1798; meaning thereby clearly the Articles for the settlement of his own Estates. By these latter Articles the Estates were limited over to the Testator's Brothers; whereas, by the other Articles, the Estates of Lady *Trollope* were limited, in default of appointment and of issue of the Marriage, to such uses as she should appoint. This inconsistency makes it manifest that the Appointment by the Will does not extend over the Estates comprised in both the Articles, but is confined to the Articles for the Settlement of his own Estates, and does not extend to those for the Settlement of the Estates of Lady *Trollope*.

2d. A Power to appoint among Children in such parts, shares and proportions, and in such manner and form as the Appointor shall direct, cannot be considered as exercised by an Appointment to Trustees for a term of years, upon trust to raise sums by way of portions for the Children.

Mr. *Hart*, and Mr. *Pemberton*, for the Defendant Lady *Trollope*.

Mr. *Trollope* for the Trustees under the Will.

Mr. *Lovatt* for the Defendant *Sir John Trollope*,
the eldest Son of *Sir John Trollope* the Testator:—

1823.
TROLLOPE
v.
LINTON.

1st. The words used in the Will are sufficient to comprise the Estates in both Articles of Settlement. The Testator must be supposed to have intended to dispose of all his Property by his Will; and he must have known that not only his own Estates, but the Estates of *Lady Trollope*, had been comprised in Articles of Settlement executed before the Marriage. He must also have known that he had no power to dispose of the Mansion-house on his Estate to his Wife, in the manner mentioned in his Will, except by the doctrine of election; and on the face of the Will itself he has expressed his intention to give effect to it by that doctrine. The Will also confirms the Articles of Settlement of his own Estates; he probably taking it for granted that, as he on his part confirmed the Articles relating to his own Estates, she also on her part would confirm the other Articles in which her Estates were comprised. The words used in the Appointment are enough to include all the Estates.

2dly. Even if there should appear to be any difficulty as to the Estates comprised in the term of 500 years, there can be no difficulty in seeing that the Testator intended the Appointment to extend to all the Estates over which he had a power of disposal.

3dly. The Leasehold Estates of *Lady Trollope* must be held to be bound by the Articles, and therefore cannot be considered as being now vested in *Lady Trollope* by right of survivorship; because, although an Infant cannot bind her real Estate, yet she may bind her personal Estate.

1823.

TROLLOPE
v.
LINTON.

Mr. Bell, in reply :

The case has been argued for Sir *John Trollope* on the false assumption, that the words of the Will amount to a disposition of the Estates of his Wife ; over which he had a power under the Articles of Agreement. If it were indeed clear that those Estates were affected by the Will, then it is also clear that there must be an election. But it is the settled doctrine of the Court, that there can be no election upon a disposition by implication. No one can be put to Election unless it is quite clear that the Testator meant to dispose of the Property. There must be a clear and manifest intention to dispose of the Property. The farthest point to which the Court has ever gone, is to admit Evidence as to the Disposal of the Property. *Hinchcliffe v. Hinchcliffe* (a). The power which the Testator had over the Estates of Lady *Trollope*, was a mere Power of Distribution among the Children. He had no power of depriving his Wife of her Interest in those Estates ; nor had he any power to give the Children less than Fee-simple Interests. The Argument founded on the words "all other Estates over which I have a Power of Appointment," is answered by the fact that the Testator, at the time when he made his Will, had other Estates, purchased by him after his Marriage, over which he had a Power of Appointment, by their having been conveyed to the usual uses to bar Dower. If the question were between the Daughters of the Marriage and the Brothers of the Testator, then the Argument on the other side must have been that, having a Power to appoint among his Children, the Testator had well executed that Power by an Appointment excluding his Daughters and giving the Estate

(a) 3 Ves. 516.

to his Brothers. The words, "all the Estates over which I have a Power of Appointment," must be construed to mean, over which I have power to appoint *to the uses hereinafter mentioned*. *Tibbitts v. Tibbitts (b)*, and *Green v. Green (c)*, are Cases in which the principle that there can be no election by implication was clearly recognized by the Court.

1823.

TROLLOPE
v.
LINTON.

The *Vice-Chancellor* held, that the circumstances of the Testator having recited the Power of Appointment over his own Estate *in hæc verba*, and yet made a disposition inconsistent with that Power, and the expression that all Persons claiming any benefit under his Will should be bound by the doctrine of election to give effect to all the dispositions in his Will, afforded evidence of intention against the argument for excluding the Wife's Estate from the operation of the Power.

His *Honor* also held, that creating a term of 500 years in Trustees was a good legal exercise of a Power to appoint for such Estate or Estates, in such parts, shares and proportions, and in such manner and form as the Appointor should think fit; and that the words "manner and form," enabled him to give Equitable Estates to his Children.

As to the Leasehold Estates, His *Honor* held that they were bound by the uses of the Articles; because, as to the Personal Estate, they were the Articles of the Husband, and not of the Wife; and that in this respect there was no difference between the Personal Estate of the Wife absolutely vested in possession in the Husband, and Choses in Action and Chattels Real, which might survive to the Wife.

(b) 19 Ves. 656.

(c) 19 Ves. 665.

1823.
6th & 14th
November.

Practice.

An Order to dissolve the Common Injunction *Nisi* may be obtained, notwithstanding the Defendant has excepted to the *Master's* Report as to the sufficiency of the Answer.

MEREST v. COSTER.

THIS was a Motion to discharge an Order for dissolving an Injunction *Nisi*, for irregularity, with Costs.

The Plaintiff had obtained the common Injunction for want of an Answer. The Answer was afterwards filed, and the Plaintiff took Exceptions to it, some of which were allowed. A further Answer was put in, and was afterwards referred back to the *Master* upon the Exceptions. The *Master* reported the further Answer sufficient; upon which the Plaintiff filed Exceptions to the *Master's* Report, and three days afterwards served the Defendant's Clerk in Court with the Order for setting down the Exceptions to be argued. On the following day, the Defendant obtained the Order *Nisi* for dissolving the Injunction.

Mr. *Wakefield*, in support of the Motion:—

The taking of Exceptions to the *Master's* Report stays all Proceedings in the Cause until the Exceptions are disposed of; therefore, the obtaining of the Order *Nisi*, pending these exceptions, was irregular.

Mr. *Wingfield* and Mr. *Glyn*, *contra*:—

For the purpose of dissolving the Injunction, the *Master's* Report is, *prima facie*, sufficient. It would be endless if all these processes are to be gone through before a Defendant can proceed at Law. *Corson v. Stirling* (a); *Scott v. Mackintosh* (b); *Bishton v. Birch* (c);

(a) Coop. 93.

(b) 1 V. & B. 503.

(c) 2 V. & B. 40.

Vipan v. Mortlock (d); *Raphael v. Birdwood* (e); *Botham v. Clark* (f). The principle to be extracted from these Cases is that, so far as regards the dissolving of an Injunction, it is indifferent whether the Exceptions are filed before or after the Order to dissolve has been obtained.

1823.

MURREST
v.
COSTER.

The *Vice-Chancellor* held, that, as to the matter of the Injunction, the Exceptions made no difference; and that the Court would, for that purpose, act upon the *Master's* Report as if no such Exceptions had been taken: That, otherwise, the question of Injunction might be suspended until the propriety of the *Master's* Report, having been discussed in the two Courts below, had received the final Judgment of the House of Lords.

(d) 2 Mer. 476. (e) 1 Swan. 228. (f) 2 Cox, 428.

HAIG v. SWINEY.

1823.

11th November.

Will.

ANN HIRST, by her Will, bequeathed to two Trustees and the survivor of them, the sum of 9,000 *l.* four per cent Stock upon Trust that they and the survivor of them should apply and dispose of the Interest and Dividends thereof, as the same should from time to time arise and be received, into the hands of her adopted child *Maria*, the Wife of *James Haig*; or otherwise to permit and suffer her to receive the same for her own sole and separate use and benefit, to the intent that the same might not be at the disposal of, or subject or liable to the control or engagements of her present or any after-taken Husband.

A bequest of Stock to Trustees, upon Trust, to pay the Dividends from time to time to a married woman, for her separate use, is an unlimited gift of the Dividends, and consequently passes the Capital.

1823.

HAIG
v.
SWINEY.

In a subsequent part of the Will, the Testatrix gave and bequeathed to the same Lady, "over and above the 9,000 *l.* Stock before bequeathed to her," all her Plate, whether real or plated, for her natural Life; and, after her Decease, her Will was, that it should go to her Daughter, *Ann Hirst Haig*; and the Testatrix also gave to the same *Maria Haig* her Gold Watch, Case, and Chains, with all her Rings and Trinkets, of what sort or kind soever, and likewise all her Wearing Apparel.

The Testatrix made several Codicils to her Will. One of them contained the following Bequest:

"I give and bequeath to *John Swiney, Esq.* and *J. J. Whittington, Esq.* all my Chest of Plate, in Trust and for the sole use of *Maria Haig*, the Wife of *James Haig, Esq.* without the control of the said *James Haig, Esq.* her present Husband, or any after-taken Husband, and not to be liable to any Debts that he has or may at any time contract, and over and above what I have before bequeathed."

The Bill was filed by *Mrs. Haig*, praying that it might be declared, that she took an absolute Interest in the 9,000 *l.* four per cent Stock, bequeathed to her separate use.

The Cause now came on to be heard.

Mr. Heald and *Mr. Gregg* for the Plaintiff:—

The only question is, whether, where Personal Property is bequeathed to a Party without more words, an absolute Interest is not given. *Elton v. Shephard*(a)

(a) 1 Bro. C. C. 532.

is the same with this Case, except merely as to the words, "into the proper hands." The same construction prevailed in *Adamson v. Armitage* (b); and in *Page v. Leapingwell* (c) Sir William Grant held, that an indefinite Gift of the Dividends gives the absolute Property in the Stock. *Stretch v. Watkins* (d), *Clough v. Wynne* (e), and *Gardiner v. But* (f), are other Cases to the same effect.

1823.
HAIG
v.
SWINEY.

Mr. Bell and Mr. Pepys for the Trustees:—

In *Adamson v. Armitage*, there was an absolute Gift of the Principal in the first instance; and the Decision amounted only to this: that directing the Executors to vest the Principal in Trustees, who should pay over the Income to the sole use of the Lady, did not cut down the absolute Interest which the previous words had given her. In *Elton v. Shephard*, it was merely decided that a Gift of the Produce of a Fund did not mean the annual Produce for Life; and that words giving an absolute Power of Appointment did not cut down the absolute Interest conferred by the first Gift.

Mr. Phillimore for Mr. Haig the Husband, stated, that he was desirous that his Wife should take an absolute Interest in the Fund for her sole and separate use, as he believed the Testatrix so intended it.

Mr. Heald, in reply, referred to the words of the Codicil as to the Gift of Plate, which showed that the Testatrix knew the difference of expression necessary to give a Life Estate, and an absolute Interest.

- (b) 19 Ves. 416. (c) 18 Ves. 467. (d) 1 Madd. 253.
(e) 2 Madd. 188. (f) 3 Madd. 425.

1823.

HAIG
v.
SWINNEY.

The VICE-CHANCELLOR:—

A general Gift of the Income arising from personal Property, is equivalent to a general Gift of the Property itself; and it makes no difference whether the Income be given to the Legatee directly, or through the intervention of Trustees.

The question in the present Case is, whether the Gift of the Dividends of the 9,000 *l.* Stock to Mrs. *Haig* be general or limited. It is argued, that the Gift is limited to her Life, because the Dividends are to be paid into her proper hands, and for her sole and separate use and benefit, a direction which is applicable only to the term of her Life. In the Case of *Elton v. Shephard*, the direction was, that the Trustees were to pay the Dividends of Stock to *Mary Elton*, for her sole and separate use, independent of her Husband, her receipt alone to be a sufficient discharge for the same; and Lord *Kenyon* held, that this was an unlimited Gift of the Stock itself. I cannot distinguish the present Case from the Case of *Elton v. Shephard*.

There are other parts of this Will and Codicil which confirm this construction. But I do not rely upon them, considering it more useful to rest the Case altogether upon the general Principle.

S. L. 111. 14. 22.

HOULDITCH v. The MARQUIS OF DONEGALL.

IN the year 1799, the Defendant being indebted to various persons to a great amount conveyed Estates to Trustees for the payment of his Debts, with power to them to issue assignable Debentures to his Creditors. In 1802, the Personal Representatives of a Mr. Jones, who had been a holder of some of the Debentures, filed their Bill in this Court on behalf of themselves and all other Creditors of the Marquis of Donegall, against the Marquis and the Trustees, for an Account and Payment of the Debentures. The Marquis of Donegall, though named a Party to that Suit, was out of the jurisdiction of the Court.

In 1803, a Decree was made referring it to the Master to take an account of the Debentures charged on the Estates. The Master made his Report on the 10th of August 1804, and on the 31st of October following it was confirmed nisi; but it was never confirmed absolutely.

The Marquis of Donegall having come within the jurisdiction of the Court, a Supplemental Bill was filed in April 1807, to have the benefit of all the proceedings against him; and in February 1808 a Decree was made accordingly. In 1809 the surviving Plaintiff died, and his Representatives never proceeded further in the Suit; but they instituted a Suit for the same objects in the Court of Chancery in Ireland, which was compromised in the year 1816.

1823.
18th & 25th
November.

Practice.
Supplemental
Bill.

Where, under an Order made in a Creditor's Suit, a Supplemental Bill is filed by a Creditor, not a Party to the original Suit, on behalf of himself and all other Creditors, to have the benefit of the Decree in that Suit, the propriety of the Order which authorized the Creditor to file the Supplemental Bill cannot be questioned at the hearing of the Supplemental Cause. When leave is given to file such a Bill, the Plaintiff in it is entitled to the same Decree to have the benefit of former proceedings, as the Representatives of the original Plaintiffs would have been entitled to on a Bill of Revivor.

1823.

HOULDITCH
v.The Marquis of
DONEGALL.

In 1810, the Plaintiffs in the present Suit became the Owners by Assignment of some of the Debentures included in the *Master's* Report; and in 1818 they filed their Bill in the Court of Chancery in Ireland, against the Marquis of *Donegall* and the Trustees, for payment of the Debentures, and for an Account.

In his Answer to that Bill, the Marquis insisted that the Plaintiff's Debentures had been improperly granted by the Trustees in respect of Claims which were usurious and fraudulent, and for gaming transactions, and that the Plaintiffs were not entitled to the payment of these Debentures. That Cause was now at issue, and the Plaintiffs had proceeded to the examination of Witnesses in it.

On the 24th of November 1820, this Court was moved, on behalf of the Plaintiffs in this Cause and of the Holders of some of the other Debentures, that they, as representing certain of the Holders of Debentures named in the *Master's* Report in the original Cause in this Court, might be at liberty to file a supplemental Bill in that Cause, to have the benefit of the Decree and other Proceedings in it.

No opposition was made to this Motion by the Representatives of the original Plaintiffs. But the Marquis of *Donegall* opposed it on two grounds; 1st. That one of the Debentures had been paid by him; 2d. That the Suit in *Ireland* was pending for the same object.

The *Vice-Chancellor* overruled these objections; because the first was merely matter of merits in the Cause when it should proceed; and because the pending of another Suit for the same objects in a Court of con-

current jurisdiction, could not be pleaded in bar before a Decree in such other Suit. His *Honor*, therefore, made an Order that the Plaintiffs should be at liberty to file a Supplemental Bill, to have the benefit of the former proceedings in this Court.

1823.
HOULDITCH
v.
The Marquis of
DONZOGALL.

The Plaintiffs filed their Supplemental Bill accordingly; and the Marquis of *Donegall* put in his Answer to it, stating objections to the validity of the Debentures, as being granted for usurious considerations and for sums lost at play, and as being fraudulently obtained by the Plaintiffs. The Answer also stated the proceedings in Ireland, and insisted that the Plaintiffs were not entitled to the benefit of the proceedings in the Original Cause here, and that the Defendant was not bound by the proceedings in this Court, but was at liberty to impeach the Debentures under which the Plaintiffs claimed.

The Supplemental Cause now came on to be heard.

Mr. *Bell*, Mr. *Wetherell* and Mr. *Tinney*, for the Plaintiffs.

Mr. *Fonblanque* and Mr. *Clayton*, for the Marquis of *Donegall*:—

I. No proceedings having been taken in the original Cause in this Court since the year 1808, the present Plaintiffs come now too late to be entitled to the benefit of the former proceedings in it. Where a Cause has been allowed to sleep for so many years, till a period when the Evidence by which the Claim sought to be established by it may be lost, the most mischievous consequences may ensue from allowing other Parties to have the benefit of the previous proceedings.

1823.

HOULDITCH
v.The Marquis of
DONEGALL.

II. The validity of the Debentures under which the Plaintiffs Claim has been put in issue in the Suit in *Ireland*, can be tried there. The only reason for the Plaintiffs coming to this Court is, that they hope under the further proceedings to shelter themselves from all further inquiries as to the validity of these Debentures.

Mr. *Whitmarsh* and Mr. *Lubè* appeared for other Defendants, who had assigned their Debentures to the Plaintiffs.

THE VICE-CHANCELLOR:—

It is insisted for Lord *Donegall* that the Plaintiffs are not entitled to a Decree to have the benefit of the former proceedings here; first, because they come too late; and next, because, being Plaintiffs in a Suit in *Ireland* in which the validity of their Debentures is expressly put in issue, they think fit to desert that Suit in order to have the benefit of the proceedings here, considering that, as the *Master's* Report here is in favour of their Debentures, all further question upon their validity will be excluded. If Lord *Donegall*, when the Plaintiffs moved for leave to prosecute the original Suit, had made the case which he now does instead of merely stating the bare fact of the pendency of the Suit in *Ireland*, it would have appeared to me to be entitled to great attention.

Where a Bill is filed by a person on behalf of himself and a class of other persons standing in the same circumstances, and the Suit, after Decree, abates by his death, or is deserted by him or his Representatives, it is almost a matter of course to permit another person reported by the *Master* to be one of that class, to take up the proceedings by a supplemental Bill. But if it were made to appear, upon his application for that

1823.

HOULDTCH

v.

The Marquis of
DONOGALL.

purpose, that he was actually a Plaintiff in another Court of concurrent jurisdiction in which the validity of his Claim was in issue in the Cause, and that the effect of permitting him to prosecute the Suit here would be to exclude all question as to the validity of his Claim, I think I should hesitate much before I could prevail upon myself to make that Order. But the Order not having been resisted on this ground, and being made, and the present Cause being brought to a hearing under the authority of that Order, I am of opinion that I cannot, upon the suggestions in the Answer to the Suit, enter into the consideration of the propriety of that Order; for such, in effect, is the nature of Lord *Donogall's* Case. The Plaintiffs having been permitted to file this supplemental Bill on behalf of themselves and all other persons of the same class, appear to me to be necessarily entitled to the same Decree to have the benefit of the proceedings in the Suit as the Representatives of *Jones*, the original Plaintiff, would have been if they had proceeded by Bill of Revivor.

The objection of delay has not great weight in this case. *Jones's* Suit in *Ireland*, which was for the benefit of the Plaintiffs as well as himself, was depending until 1816, and in 1818 the Plaintiffs filed their own Bill in *Ireland*. It is to be observed too that, if Lord *Donogall* has a right to question the original consideration of the Debentures, he is not necessarily excluded from that purpose by the present state of the proceedings in this Suit; for, inasmuch as the *Master's* Report of the Debentures has never been confirmed absolutely, it may be open to him, upon a sufficient case, to make such application as may lead to the further investigation of these Claims.

1823.
19th November.

HAYNES v. LITTLEFEAR.

Will.
Construction.

S. H. bequeathed the Dividends of her Property in the Funds to *W. H.* for his life, and directed that, after his decease, the Principal should be divided amongst his Children in the manner after-mentioned: she then gave the Children certain sums of Money, which would have exhausted the whole of her funded Property at the date of her Will. Between that time and her death, that Property had greatly increased. Held, that the Executors were entitled to the Surplus as undisposed of.

THE three following Questions arose upon the Will of Mrs. *Sarah Haynes*:

1st. Whether the Children of *William Haynes*, the Testatrix's Brother, were entitled to the Residue of her Personal Estate, in proportion to their respective Legacies?

2d. Whether *Thomas Littlefear*, the surviving Executor, was entitled to it for his own use? Or

3d. Whether it was to be distributed amongst the Testatrix's next of Kin?

The following is an exact Copy of the Will, which was written by the Testatrix herself:

" I, *Sarah Haynes*, Spinster, of *Freeman's Lane*, in the Parish of *St. Johns, Southwark*, in the County of *Surrey*, being of sound mind, memory and understanding, do make this my last Will and Testament, in the manner following (that is to say), as to such worldly Estates, wherewith I am possessed, I dispose of in the following manner: first, I direct that all my just Debts and Funeral Expenses be paid: I give to my Brother all my Household Furniture, including Household Linen, for his own use; I likewise give to my Brother *William Haynes*, all my Plate and China, for his life; and after his decease, not to be sold, but to be divided between his five Children,

1823.

HAYNES
v.
LITTLEFEAR

or as many as shall be living at that time, and to be kept by them in remembrance of their Ancestors: I give to my Brother *William Haynes*, all Monies, Dividends of my Property that is invested in the Public Funds in my name, and all other Monies whatsoever or wheresoever that shall be due to me, for his life, and him to receive all Dividends as they become due, or to be at liberty to empower to receive for him; and, after his decease, I direct all Principal and Interest to be divided between his Children in the following manner: I give to his Son *William Watton Haynes*, 500 l.; to *John Hardcastle Haynes*, 300 l.; to *Robert Haynes*, 300 l.; to *Elizabeth Littlefear*, 300 l.; to *Ann Haynes*, 300 l.; but there shall be no division till after the decease of my Brother *William Haynes*. I likewise nominate, constitute and appoint my Brother *William Haynes* and *Thomas Littlefear*, Gentleman, of *Kennington Lane, Surrey*, my Executors of this my last Will writing with my own hand and seal, this sixteenth day of May, in the year of our Lord one thousand eight hundred and twelve."

The Testatrix died on the 28th December 1821, leaving her Brother *William Haynes*, and the Defendant *Thomas Joseph Littlefear*, the Executors of her Will, her surviving.

William Haynes died in January 1822.

At the date of the Will the Legacies would have exhausted the whole of the Testatrix's funded Property; but between that time and her death that Property had been considerably increased.

1823.

HAYNES
v.
LITTLEFEAR.

Mr. Hart, Mr. Heald and Mr. Whitmarsh, for the
Legatees :—

The Testatrix, in giving these Legacies, meant merely to prescribe the ratio in which her Property was to be divided amongst the Legatees. In the introductory Clause she expresses an intention to dispose of the whole of the Property which she might have at her death. *Wilde v. Holtzmeyer (a)*. She then gives to her Brother all Monies, Dividends of her Property that was invested in the Public Funds in her name, and all other Monies that should be due to her, for his life. By the word Monies, she meant every thing that produced Dividends to her. Her Property consisted entirely of Stock, except the Furniture and Plate, which she bequeaths specifically. She then directs all the Principal and Interest (by which she meant the corpus) to be divided amongst her Brother's Children in certain proportions, but says that no division shall take place until his decease. It is quite clear, therefore, that she intended that the whole of what she had given to her Brother for his life, should be divided amongst his Children after his decease. And by the words, "in the following manner," she intended to prescribe the proportions in which the Property was to be divided. *Cordell v. Norton (b)*.

The Vice-Chancellor, after hearing the Arguments for the Legatees, expressed a decided opinion against their claim.

(a) 5 Ves. 811; see particularly page 816.

(b) 2 Vern. 148. S. C. Prec. Ch. 12, and 1 Eq. Ab. 244, under the name of *Cordell v. Norton*.

Mr. Sugden and Mr. Norton for the next of Kin:—

It is impossible for the Executors to claim the residue of this Testatrix's Property. They cannot show any favourable disposition, or any expression of confidence or regard towards them in any part of the Will; on the contrary, the Testatrix throughout the whole Will manifests an intention against their taking any part of her Property. In the introductory Clause she expresses an intention to dispose of the whole of her Property; and, in the next place, she does dispose of it to a certain extent; for she gives it to her Brother for his life. In order to defeat the Claim of the Executors, it is not necessary that a Testator should actually dispose of his Property; it is sufficient if he shows an intention to give it away from them: as where a blank is left for the name of the residuary Legatee.

1823.
HAYNES
v.
LITTLEPEAR.

The VICE-CHANCELLOR:—

If this Testatrix had foreseen the increase which has taken place in her funded Property, she would probably have used different expressions. The Court can give effect only to the expressions which she has used. It is plain that she considered that the five Legacies would exhaust the whole of her Monies and funded Property; but she has not stated what was to become of the surplus, if that should happen not to be the case. And it is no necessary inference that, because she gave 1,700 l. to three Children when she considered this Property to be of that amount, she must have intended that the Children should take the whole of this Property, whatever might be its amount. The surplus of the Monies and funded Property after payment of the Legacies, is, therefore, undisposed of, and, under the circumstances of this Will, belongs to the Executors.

1823.
19th November.

Will.

The words
“Securities for
Money,” in a
Will, pass Stock
in the Funds,
unless the force
of the expression
is controuled by
the context.

Whether Bank
Stock will pass
by the same
words? Qu.

BESCOBY v. PACK.

ONE of the Questions in this Cause was, whether Bank Annuities and Bank Stock passed in a Will under the description of Securities for Money.

Mrs. *Mary Kerby*, after devising her real Estates, and bequeathing certain specific Legacies, gave to her Niece *Catharine Bescoby*, such of her Furniture and Effects as should be expressed in any Codicil or Paper Writing signed by her, and annexed to her Will, or found therewith; and she gave to her Nephew *Richard Pack*, all her other personal Estate and Effects whatsoever, except Monies and Securities for Money, and Clothes; and she gave all her Monies and Securities for Money, and all Monies which should be due to her at her decease, to *T. S. W. Samwell*, and *W. H. Kilpin*, and her Nephew *Richard Pack*, upon Trust, to pay thereout certain pecuniary Legacies, and to place out the residue upon good Security, and pay the Interest thereof to her Niece *Catharine Bescoby*, for her life, and, after her decease, to pay the Principal amongst all her Children.

The Testatrix died possessed of considerable sums of Bank Annuities and Bank Stock, besides other Personal Estate.

The Bill was filed by the Children of *Francis* and *Catharine Bescoby*, against *Richard Pack*, the Executors, three of the Legatees, and *Francis* and *Catharine Bescoby*; and it prayed that the Trusts of the Will might be carried into execution, and that the usual Accounts might be taken of the Testatrix's personal Estate.

Mr. *Horne* and Mr. *Keene* for the Plaintiffs, contended, that the Bank Annuities and Bank Stock did pass under the description of Securities for Money; and cited *Dicks v. Lambert (a)*.

1823.

BESCOBY
v.
PACK.

Mr. *Heald*, for the Defendants Mr. and Mrs. *Bescoby*.

Mr. *Bell* and Mr. *Beames* for the Defendant *Richard Pack (b)*.

The VICE-CHANCELLOR :—

Whether Stock in the Public Funds will or will not pass under the expression of Securities for Money, depends upon the context of the Will. If there be nothing in the Will to controul the force of that expression, I am of opinion that Public Stock will pass by it : and there is nothing in this Will to controul it.

It is argued that Bank Stock stands upon a different ground, and is nothing more than a description of the proportion in which the Proprietor is interested, as a Partner, in a public Trading Company. Before I can come to any conclusion upon this point, I must have the Case very fully argued, and the several Statutes which apply to the Bank of England carefully considered. The Question is too important to be disposed of superficially.

The Cause was not mentioned again.

(a) 4 Ves. 725.

(b) The Arguments related principally to the operation of a Codicil upon the residuary Clause in the Will, as to which we did not think it advisable to report the Cause.

1823.
30th November.

REVETT v. HARVEY.

Guardian.
Infant-Account.

A Solicitor, who advanced Money to an Infant for the subsistence of himself and his Family, and acted as his confidential adviser, is in the nature of a Guardian to him; and an Account settled between them within a month after the Infant came of age, and without the latter having any assistance, was opened, notwithstanding the Vouchers had been delivered up.

THE Bill prayed that a Warrant of Attorney which the Plaintiff had given to the Defendant to confess Judgment for 500 *l.* and a Memorandum or Acknowledgment signed by him, expressing that he was indebted to the Defendant in a sum of 1,218 *l.* 2 *s.* 2 *d.* might be delivered up to be cancelled, and for an Injunction to restrain the Defendant from giving them in evidence in an Action at Law against the Plaintiff, and from proceeding in that Action.

In the month of July 1817, the Plaintiff, who was then only eighteen years of age, had been for some time married; and although he was likely soon to come into possession of considerable real Estates, was then in great pecuniary difficulties. At this time his Mother happened accidentally to meet the Defendant, with whom she had some previous acquaintance, and entered into conversation with him on the state of her Son's affairs. The Defendant was an Attorney, and on that occasion expressed to the Plaintiff's Mother a warm desire to be of service to the Plaintiff, desiring her to bring him to his Chambers in a few days. Accordingly the Plaintiff went thither in a few days, accompanied by his Mother, and carried with him a Copy of the Will, under which he was entitled to the Property, which was to come into his possession on the death of a Lady then of an advanced age.

The Plaintiff being at that time in great want of Money, it was proposed that the Defendant should

1823.

REVETT
T.
HARVEY.

make him an Allowance of 320 *l.* a year for the maintenance of himself and his Family, by quarterly payments. The Defendant, however, would not make any advances until he had taken the opinion of Counsel as to the validity of any Security which he might take for the repayment. A Case was accordingly prepared by the Defendant and laid before Counsel, who advised that, on account of the infancy of the Plaintiff, no valid Security could be granted.

When the Defendant received this Opinion, he refused to advance so large a sum as 80 *l.* a quarter; but agreed to advance 150 *l.* a year, by monthly payments of 10 *l.* and 15 *l.* alternately. After this Agreement, the Defendant advanced Money to the Plaintiff, taking his Promissory Notes for the amount of each sum advanced. It was expressed on the face of these Notes that the Cash was advanced by the Defendant to pay for the Plaintiff's Board and Lodging.

In the month of June 1818, the Defendant required the Plaintiff to give a Promissory Note for the sum of 500 *l.* and a Warrant of Attorney to enter up judgment against the Plaintiff for that sum. It was stated by the Bill, that the Defendant had only advanced 120 *l.* up to that time, and that he required the Plaintiff to give this Promissory Note and Warrant of Attorney for 500 *l.* as a Security for future advances, as well as for the advances made up to that time by the Defendant; and there was express evidence to that effect. But the Defendant by his Answer stated that, at the time when the Plaintiff gave the Promissory Note and executed the Warrant of Attorney, he was actually indebted to the Defendant to that amount; but no account of those advances was delivered or stated at that time.

1823.

REVETT
v.
HARVEY.

The Defendant continued to advance sums of Money to the Plaintiff till the month of February 1820, when the Plaintiff attained the age of twenty-one. During the whole of this time the Defendant acted as the Solicitor of the Plaintiff, and as his confidential Friend and Adviser.

On the day on which the Plaintiff attained twenty-one, he wrote to the Defendant, expressing a wish to be informed how much he was indebted to the Defendant for Money advanced. The Defendant, however, did not supply the information requested by this letter. On the 22d of April 1820, (about two months after the Plaintiff had come of age) he called upon the Defendant and signed an Acknowledgment in the following form, the sum being left blank in the Memorandum: "Sir, in adjusting our Accounts which have this day been settled at the sum of £. I cannot withhold the expression of my warmest thanks," &c.

The Bill charged, that, at the time when the Plaintiff was induced to sign this Acknowledgment, the Defendant promised, before the Sum was filled up, to produce all the Vouchers, but that he never did produce them, and never settled any Account with the Plaintiff; and that the Defendant himself afterwards filled up the Blank with the Sum of 1,218 £. 2 s. 2 d. which was about 800 £. more than the amount actually due on account of the Defendant's advances.

The Answer stated that the Acknowledgment was voluntarily written by the Plaintiff and given by him to a Clerk to be copied, and that this Copy was signed by the Plaintiff on the 22d of April 1820, the sum being left blank; that on the following morning the Plaintiff called upon the Defendant, when all the Vouchers were

minutely examined, and the amount of them cast up by the Plaintiff, who found the amount, including interest, to be the sum of 1,218 *l.* 2 *s.* 2 *d.* and that the Plaintiff, when he had thus ascertained the amount, filled up the blank in the Acknowledgment with the sum of 1,218 *l.* 2 *s.* 2 *d.* and that, thereupon, all the Vouchers Memorandums and Documents relating to the Accounts were delivered up to the Plaintiff, except the Warrant of Attorney for 500 *l.* which was cancelled and remained in the Defendant's possession. The Answer likewise stated that no person was present besides the Plaintiff and Defendant when the Vouchers were examined and delivered up, and the amount settled and the Blank filled up, as thus alleged.

1823.
—
REVETT
v.
HARVEY.

The Answer admitted that no Account was ever sent or delivered to the Plaintiff, or was ever stated between the Plaintiff and Defendant, except so far as the Settlement on the 23d of April 1820 could be taken as such Account: That the Defendant was at first unwilling to advance so large a sum as 80 *l.* a quarter to the Plaintiff, after he had received the Opinion of Counsel; but that the distress and entreaties of the Plaintiff overcame his unwillingness; and that the Defendant had kept no Account of his Advances to the Plaintiff, other than such Memorandums, Notes or Acknowledgments as he had delivered up to the Plaintiff on the 23d of April 1820.

The Plaintiff, soon after he came of age, employed another Solicitor: and, in June 1820, the Defendant commenced an Action against him, in the Court of Exchequer, to recover the Sum of 1,218 *l.* 2 *s.* 2 *d.* upon which the present Bill was filed.

1823.

REVETT
v.
HARVEY.

The Action at Law was defended, but a Verdict was recovered for the 1,218 *l.* 2 *s.* 2 *d.* After the Verdict, and after the Defendant's Answer had been put in, a Motion was made before the *Lord Chancellor* to restrain the Defendant in this Court from proceeding to execution on his Verdict at Law.

The *Lord Chancellor* expressed an Opinion, upon this Motion being made, that the Court was not precluded by the Verdict at Law from granting an Injunction in such a Case; and his Lordship accordingly granted the Injunction, upon the terms of the Plaintiff paying into Court the sum of 405 *l.* which was the amount he admitted to have been advanced to him by the Defendant.

The Cause now came on to be heard.

There was no Evidence on the part of the Plaintiff as to the Figures inserted in the Blank in the Memorandum. Several Witnesses on the part of the Defendant deposed that, on comparison, they believed those Figures to be the hand-writing of the Plaintiff and not of the Defendant.

Mr. *Heald* and Mr. *Collinson* for the Plaintiff.

Mr. *Horne* and Mr. *Wakefield* for the Defendant, insisted that the most material point in the Plaintiff's Case, and that on which the principal part of the Relief sought by the Bill was founded, was the Allegation that the Blank which was left in the written Acknowledgment had been filled up by the Defendant: that that Allegation had not at all been proved: that therefore, as the material part of the Case had thus fallen

to the ground, the subordinate Relief sought by the Bill could not be granted : and that a material reason why the Court should not now open the Account was, that the Defendant had, as was stated in his Answer, delivered up or destroyed all the Vouchers.

1823.

REVERT
v.
HARVEY.

The VICE-CHANCELLOR, [after stating the Facts of the Case] :—

It does not appear to me to be necessary to enter into any detailed consideration of the facts of this Case. This Case must be governed by the principles which apply to a Guardian and his Ward. The Defendant thought fit to place himself in a relation with this Infant, which gave him great influence over his mind ; and he cannot be permitted to conclude the Plaintiff by an acknowledgment signed by him within a month after he came of age, and without the intervention of any friend or adviser on his part.

WYNTER v. BOLD.

1823.

27th November.

BY the Settlement made on the Marriage of *William Wynter* with *Elizabeth Bold*, certain real Estates were conveyed to the use of *William Wynter* for his life ; with Remainder to Trustees to preserve contingent Remainders ; with Remainder to *Elizabeth Bold* for her life ; with Remainder to a Trustee for the term of 500 years ; with Remainder to the first and other Sons of the Marriage in Tail Male ; with divers Remainders over.

Portions.

Where a Parent, who is Tenant for Life of a settled Estate, with Remainder to a Trustee for a term of 500 years, upon Trust to raise portions

for younger Children, has power to appoint the portions by Deed or Will, they cannot be raised in the Parent's lifetime ; and the whole Sum cannot be raised until they have all attained 21.

1823.

WYNTER
v.
BOLD.

The Trusts of the term of 500 years were, that, in case there should be any younger Children of the Marriage, then the Trustee of the term should, by Sale or Mortgage, raise 3,000 *l.* and dispose of the same unto and amongst such younger Child or Children, in such shares, and at such times, and upon such conditions, and in such manner, as *William Wynter* and *Elizabeth Bold*, or the Survivor of them, by any Deed, Will or other Instrument in writing, to be by them, him or her executed as therein mentioned, should direct or appoint; and, for want of such direction, should pay the 3,000 *l.* to and amongst such younger Child or Children, if more than one, Share and Share alike; and if only one such Child, then the whole to such only Child at his, her or their respective age or ages of twenty-one years, or day or days of Marriage; but in case of the decease of any of them married and leaving Issue, the Share or Shares of him, her or them so dying to go and be paid to and amongst his, her or their Children respectively, in equal Shares.

In April 1805, *William Wynter* died, leaving *Elizabeth* his Widow and five Children by her surviving. In 1817, the eldest Son attained the age of twenty-one, and soon afterwards, in consideration of 1,500 *l.* and of a Rentcharge of 400 *l.* secured upon part of the Estates, the Widow sold and conveyed her Life Interest to him, and he suffered Recoveries of the Estates.

In June 1822, the Widow, with the concurrence of the eldest Son, executed an Appointment of the 3,000 *l.* among the younger Children equally.

The Bill in this Cause was filed by the eldest Son against the Widow, the younger Children and the

Trustee; praying that, upon payment of their Shares of the 3,000*l.* and Interest to two of the Children who had attained the age of twenty-one, and, upon payment of the Shares of the Infants in such manner as the Court should direct, it might be declared that the Trusts of the Term were satisfied, and that the Trustee might be directed to surrender it to the Plaintiff, or assign it in such manner as the Plaintiff might direct.

1823.

WYNTER
&
BOLD.

It was stated in the Bill that, in the year 1822, when the Widow was desirous of executing the Power of Appointment, doubts were entertained whether there was power to raise the whole or any part of the Portion of any Child during the infancy of the Child, and whether the Portions carried Interest during the infancy of the Child, or during the life of the Widow; and that, in order to obviate these doubts, the Plaintiff had concurred in the appointment.

The Cause now came on to be heard; and the Question was, whether the whole 3,000*l.* or any part of it, could now be raised.

Mr. *Bell* and Mr. *Tempest*, for the Plaintiffs:—

The first Question is, whether the Portions can be raised out of a reversionary Term; and the next Question is, whether the whole 3,000 *l.* can be raised in one sum.

All the Authorities which regulate Cases of this description were examined by the *Lord Chancellor* in *Codrington v. Foley* (a). It is there stated, that if the Portion depends upon any contingency the Court can—

(a) 6 Ves. 364.

1823.

WYNTER

v.

BOLD.

not direct it to be raised in a case of this kind. But in this Case there is no contingency, though there is a Power of Appointment and that Power has been exercised. If the whole Sum be raised at once, the Court can take care to secure the Shares of the Infants as effectually as they are now secured by the Term.

Mr. *Witham*, for the Children, and Mr. *Knight*, for the Trustee, made no opposition, but left the Question to the Court.

The VICE-CHANCELLOR:—

Whether a Portion is or is not to be raised out of a reversionary Term, is a Question of intention; and, inasmuch as the Mother has power to appoint this Sum to the younger Children by her Will, it is plain that it was not the intention that it should be raised during her life.

The other point is equally against the Plaintiff. There is nothing in the expression of this Settlement which would justify the raising of the 3,000*l.* as an entire Sum, or would deprive the infant Children of the security of this Term until their Portions are paid.

ROWLEY v. ECCLES.

1823.
8th and 9th
December.

TO this Bill the Defendant had demurred, on the ground that the Plaintiff had not stated his place of abode. The Demurrer was overruled upon argument. The Defendant then pleaded that the Defendant did not reside at the place stated in the Bill.

Practice.

After a Demurrer overruled, the Defendant cannot plead to the Bill without the leave of the Court.

Mr. *Wakefield*, for the Plaintiff, now moved to take the Plea off the File. He said, that the Demurrer was in the nature of a Demurrer in abatement, not of a Demurrer in bar; that the Plea was a Plea in abatement; and that two Dilatories could not be filed without the leave of the Court. *East India Company v. Campbell* (a); *Finch v. Finch* (b); *Bancroft v. Wardour* (c); *Freeland v. Johnson* (d); *Baker v. Mellish* (e).

Mr. *Cooper*, for the Defendant :—

I can find only one Authority upon the subject, and that is the following passage in Lord *Redesdale's* Treatise on Pleading: "And if a Demurrer should be overruled on argument, because the facts do not sufficiently appear on the face of the Bill, defence may be made by Plea, stating the facts necessary to bring the Case truly before the Court; though it has been said, that the Court would not permit two Dilatories (f)." This Dictum of Lord *Redesdale* is a very strong authority; for it appears that the objection now made on behalf of the Plaintiff was under his Lordship's consideration, but that he did not think it of any weight.

- | | | |
|-------------------|-----------------|----------------------|
| (a) 1 Ves. 246. | (b) 2 Ves. 491. | (c) 2 Bro. C. C. 66. |
| (d) 2 Anstr. 407. | (e) 11 Ves. 68. | (f) See p. 176. |

1823.

ROWLEY
v.
ECCLES.

Mr. Wakefield, in reply :—

The passage cited from Lord *Redesdale's* Treatise does not allude to a Demurrer in abatement. Neither Courts of Law nor of Equity allow of two Dilatories. At Law a Party cannot plead twice in abatement.

The VICE-CHANCELLOR :—

It is stated that this Motion is opposed by the direct authority of Lord *Redesdale*, in his valuable Treatise on Equity Pleading.

The Case of *Hudson v. Hudson*, mentioned by Lord *Redesdale*, appears, upon reference to the Register's Book, to be an Authority directly in point in support of the present application (g). The dicta in the other Cases which have been cited all tend to the same conclusion. The meaning of the expression that two

(g) "Friday, 29th March.

"Upon consideration this day had by the Right honourable the *Master of the Rolls*, of the humble Petition of the Plaintiffs, setting forth that they, in Trinity Term 1733, filed their Bill against the Defendants, to which they put in three separate Demurrers, which came on to be argued the 16th of this instant March, and were then overruled: That on the 27th of this instant March, the Defendants obtained an Order that the Defendants *Benjamin Hudson* and his Wife, and *Catherine Hudson*, should be at liberty to take out a Commission to take their Plea and Answer in the Country, and that they should have till the first day of the next Term to return the same, and that the Defendant *Joseph Hudson* should have till the first Seal to put in his Plea or Answer to the Plaintiffs Bill: That the Plaintiffs apprehend that it is the practice of the Court, where a Defendant puts in a Demurrer to a Bill which is overruled, he shall not be at liberty afterwards to put in a Plea thereto. And forasmuch as the said Defendants have already demurred to the said Bill, which is overruled, it is Ordered, that so much of the said Order of the 27th of this instant March, as gives the Defendants liberty to put in a Plea to the said Plaintiffs Bill, be discharged; Notice whereof is forthwith to be given to the other side."

Reg. Lib. A. 1733, fol. 242.

Dilatories will not be permitted in Equity, is that the Defendant is only once permitted to delay his Answer by Plea or Demurrer, without leave of the Court. After Plea overruled, he cannot file another Plea or Demurrer, without a Special Order. So, after Demurrer overruled, he cannot, without Special Order, file another Demurrer or Plea.

Plea ordered to be taken off the File.

1823;

ROWLEY
v.
ECCLES.

ROBERTS v. SMITH.

1823.
12th December.

THE Question in this Cause was, whether the Testator's Widow was entitled both to her Dower and the Provision made for her by the Will, or was bound to elect between them.

Widow.
Election.

William Roberts, after giving to his Wife, *Mary Roberts*, formerly *Mary Harradine*, a Freehold Messuage or Tenement and Premises in fee simple, and all such ready Money as he should have by him at the time of his death, and all and singular his Household Goods, Plate, Linen and China, Furniture and Utensils whatsoever in and belonging to his Dwelling-house, for her own use and benefit; and after giving to his Son *William Roberts*, his Heir at Law, the sum of 1*s.* gave and devised to *Joseph Smith*, of the Parish of *St. Nicholas Deptford*, Baker, and *Joseph Smith*, then of the same Parish, Victualler, but since deceased, and to the said *Mary Roberts*, certain Freehold and Leasehold Messuages, and all other his Estates whatsoever and wheresoever, and all other his Property of what nature or

Testator devised Gavelkind Lands to his Wife and two other persons in Trust, as to one moiety, for his Wife during her Widowhood, and as to the other moiety, for his Children. Held, that the Wife must elect between her Dower and the Provision under the Will.

1823.

ROBERTS
v.
SMITH.

kind soever, upon Trust to pay and apply one half part of the Money arising therefrom to the said *Mary Roberts*, during her natural life and so long as she should remain unmarried, for the Support and Maintenance of herself and the Education of *Elizabeth Ann Harradine*, *Joseph Harradine*, *Mary Harradine*, *Maria Harradine*, and *Robert Harradine*, the Children of her former Husband *Joseph Harradine*, until they should respectively attain their ages of twenty-one years; and then upon Trust to pay and apply the same, and also the other half part of the Monies to arise as aforesaid from the time of the said Testator's death, in and upon the Maintenance and Education of all such Children as he should happen to leave at the time of his death under the age of twenty-one years, until they should respectively attain their respective ages of twenty-one years; and, immediately on attaining that age, such Child to take an equal share of his said Freehold Property, for the term of his natural life; and, in case of death, he directed that the part or share of him, her or them so dying should go in like manner unto and amongst, and be in Trust for the surviving Child and Children, and to be equally divided between them, share and share alike, until the longest liver should take the whole; namely, unto his Sons *Henry Roberts*, *George Roberts*, *James Roberts*, *Richard Roberts*, and *Thomas Roberts*, and to his Daughters, *Mary* the Wife of *James Harris*, and *Sarah* the Wife of *Thomas Marshall*, to hold as Joint Tenants, and not as Tenants in Common; and, from and after the decease of all the Testator's said Children, then to his own right Heirs for ever.

The Bill was filed by *Charles Christopher Roberts*, one of the Testator's Sons, against the surviving Executor,

the Widow, the other Children of the Testator, and the Children of the Widow by her first Husband; and it prayed that the Will might be established and the Trusts of it performed; that an Account might be taken of the Rents of the devised Estates, and that one eighth part of a Moiety of those Rents might be paid to the Plaintiff.

1823.

ROBERTS
v.
SMITH.

The Testator's freehold Estates were of Gavelkind Tenure.

Mr. *Roupell*, for the Plaintiff:—

The Testator, after giving his Wife an Estate in fee in part of his Property, devises all the remainder of his Estates to her and two other persons, as Trustees. Now that Devise is, of itself, sufficient to manifest an intention that the Widow should not take for her own benefit what had been devised to her in Trust for others. Can it be supposed that the Testator would have given her the absolute Interest in one Estate, if he had thought that she was to take her Dower also? She takes under the Will more than the Custom would give her; for she not only takes the absolute Interest in one Estate, but also an Interest for her Widowhood in one moiety of the remainder of the Property; and yet she claims not only the whole of this Moiety, but also a Moiety of the other Moiety. The disposition made by the Testator of his Property cannot take effect, if this Claim is to prevail; and therefore the Widow must be put to her election. *Birmingham v. Kirwan* (a); *Villareal v. Lord Galway* (b).

Mr. *Bell* and Mr. *Barber* for the Defendants in the same Interest as the Plaintiff:—

(a) 2 Scho. & Lef. 444.

(b) Amb. 682.

1823.

ROBERTS
v.
SMITH.

Your Honor's Argument in *Lord Dorchester v. The Earl of Effingham* (c), puts the doctrine upon this subject upon its proper footing. In this Case neither the Devise in fee to the Wife, nor the Devise to her and the Trustees in Trust to sell, will exclude her right to Dower. The Testator evidently intended an equal division of the Trust Estates between the Widow and the Children. But that intention would be defeated if she were to take a moiety for her Dower; for then she would take one moiety paramount the Will, and half of the other Moiety under the Will; so that she would take three fourths, and the Children one fourth only. This Case comes precisely within the principle of *Chalmers v. Storil* (d).

Mr. Heald for the Widow :—

In *Chalmers v. Storil*, the Will directed an equal division of the Property amongst three persons; therefore the Testator gave to his Widow what she would have taken as her Dower. The division in that Case seems to me to have excluded the right of Dower. If a Devise to Trustees to pay Debts will not exclude the Wife's right to Dower, how can it be contended that a Devise to her and two other persons will have that effect? The Devise to the Wife and the other Trustees is only a Devise of all the Testator's Right and Interest, subject to the Wife's Right of Dower, and therefore does not oust her of that Right.

The VICE-CHANCELLOR :—

The principle referred to in *Chalmers v. Storil*, decides this Case. The plain intention of the Testator was, that the Wife should have half the Income of his Pro-

(c) Coop. 319.

(d) 2 V. & B. 222.

perty for the Maintenance of herself and her Children by her former Husband, and that the other half of the Income should be applied to the Maintenance and Education of the Testator's own Children. That intended equality would be disappointed if the Wife were, in the first place, to take her Dower.

1823.

ROBERTS
v.
SMITH.

GRASSICK v. DRUMMOND.

1823.
12th December.

Will.
Construction.

CHARLES CHRISTOPHER M'INTOSH, by his Will, dated *Canton*, 20th November 1803, after reciting that he considered that he had Property to the amount of 30,000 *l.* which was positively disposable by him, and that it was his intention to state his desire as to the final distribution of it, appointed *James Drummond*, *Thomas Wilkinson* and *Charles Forbes*, Executors of his Will, and then proceeded to dispose of his Property as follows :—

“ I give to the said *James Drummond*, *Thomas Wilkinson* and *Charles Forbes*, or either of them, their Executors or Assigns, all my Personal Property, for I boast no Inheritance, in Trust only for the subjoined purposes. I primarily will that these my named Executors cause to be invested in the Public Funds the sum of 9,000 *l.* Sterling, the Interest whereof I wish in equal portions to be annually paid to my dear Mother *Penelope*, and my Sisters, *Helen* and *Margaret*, all of *Aberdeenshire*; and of this Principal Sum it is my desire that my Mother have 1,000 *l.* to testify at her death her sense of any kindness experienced during my long and unavoidable absence from her in life, and that my Sisters

Testator directed the Interest of a sum of Money to be paid to his Sisters during their lives, in equal proportions, and at their deaths gave to their Children the Inheritance their Mothers derived from his Estate, and desired that his Sisters should be the Residuary Legatees, in the proportions already noticed. Held, that the Sisters were entitled to the Residue absolutely, and that their Children took no Interest in it.

1823.
 GRASSICK
 v.
 DRUMMOND.

then succeed to the annual Rent of the other 2,000 *l.*; and, at their respective deaths, I will their Children, in equal Shares, the Inheritance their Mothers derived from my Estate. Understanding lately that my paternal Uncles, *James* and *George*, left several Children in indigent circumstances, I wish 2,000 *l.* sunk on Annuity for their common benefit." The Testator then gave several pecuniary Legacies, and afterwards expressed himself as follows:—"I desire, in the proportions already noticed, that my Mother and Sisters be the Residuary Legatees."

The Testator afterwards made a Codicil in the following words:—

"*Dirandoo, Ceylon Island, 25th July 1805.*—Imagining, on reasonable data, my Estate will, by January ensuing, at least realize 50,000 *l.* I desire that the Legacy to my paternal Cousins may be doubled, and that my Mother and Sisters, as before stated, continue Residuary Legatees."

The Testator's Sister, *Helen*, married *Peter Grassick*; his other Sister, *Margaret*, was the Widow of *George Anderson*. Their Mother survived the Testator, but died before the commencement of the Suit.

The Bill was filed by the Children of the Sisters, born in the Testator's lifetime, against their Parents, the Executors of the Testator and of his Mother, and certain other Persons. It stated that the Plaintiffs had been advised that they were interested in the whole or some part of the Testator's residuary Estate; and it prayed that their Rights and Interests in the residue might be declared and their Shares invested and secured for their benefit.

The Sisters, by their Answers, submitted that, under the Will and Codicils, they and their Mother took absolute Interests in the residue, as Tenants in Common, and that the Plaintiffs had no Interest therein.

1823.
GRASSICK
v.
DRUMMOND.

Mr. *Horne*, and Mr. *Roupell*, for the Plaintiffs :—

The opinion of the Court is not asked as to the Interests the Legatees take in the 9,000 *l.* except so far as the disposition of that Sum is connected with the disposition of the Residue. The question to be decided is, what Interest the Parties take in the Residue. The Plaintiffs contend that, as the Testator's Sisters take Life-Interests only in the 9,000 *l.* and after their deaths the whole of that Sum (with the exception of the 1,000 *l.* which the Mother was enabled to dispose of) goes to the Plaintiffs ; so the Sisters take Life-Interests only in the Residue, and after their deaths it also is divisible amongst the Plaintiffs. The Testator, after disposing of the 9,000 *l.* says :—" I desire, in the proportions already noticed, that my Mother and Sisters be the Residuary Legatees." These words are to be considered not only as prescribing the Shares in which the Mother and Sisters were to take the Residue, but also as designating the proportion of Interest which each of them was to take in her Share. The Testator, in a former part of his Will, directs that the Children should take the Principal of what their Mothers took a Life-Interest in under his Will, and therefore it was unnecessary for him to mention the Children again in the Residuary Clause.

Mr. *Bell*, Mr. *Sugden*, Mr. *Loat*, Mr. *Pepys*, Mr. *Pemberton* and Mr. *Tennant*, appeared for the different Defendants.

1823.

GRASSICK
v.
DRAUMMOND.

The VICE-CHANCELLOR:—

I cannot add to this Will upon conjecture. The Mother and Sisters are to be his Residuary Legatees in the proportions already noticed ; that is, in equal proportions. If he meant that his Mother's Share of the Residue should survive to the Sisters and their Children, he has unfortunately omitted to express that intention.

1823.
17th December.

MARSHALL v. THE CORPORATION OF
QUEENBOROUGH.

Corporation.

If a regular Corporate Resolution has been passed for granting an Interest in the Corporate Property, and, upon the faith of it, expenditure has been incurred, the Court will compel the Corporation to make a legal Grant in pursuance of the Resolution, although it is not under the Corporate Seal.

Semble.

THE Case made by the Bill was, that, in 1810, the Plaintiff having taken a Lease from the Defendants of a piece of Land adjoining to the Channel of a Creek, part of the Waste Land of the Borough of *Queenborough*, on which he had built four Houses, and finding that the Water of the Creek was undermining the Foundations, applied to the Defendants, at one of their Courts, for permission to fill up part of the Creek adjoining his Houses, and to make a Wharf and certain other Buildings thereon: That the Members of the Corporation then present told the Plaintiff that they would come and look at the piece of Ground which he had applied for ; and that, shortly afterwards, the then Mayor, and two of the Jurats, came to view it ; when the Plaintiff measured out the part which he wanted, and pointed out to them the injury which his Houses had suffered from the Tide: That they were satisfied with the necessity of complying with his request, and verbally granted him the piece of Ground: That the Plaintiff immediately took posses-

sion of it, and afterwards made a Wharf and certain other Buildings thereon, at his own Expense: That he continued in quiet possession of this piece of Ground without paying any Rent, or making any Acknowledgment to the Defendants, or having any Demand made upon him in respect thereof, until Easter Term 1819, when the Defendants brought an Action of Ejectment against him, and, at the Trial of the Action, obtained a Verdict.

1823.
MARSHALL
v.
Corporation of
QUEEN-
BOROUGH.

The Prayer of the Bill was, that the Plaintiff might be declared to be entitled to the benefit of the License, which he alleged had been granted to him, for the remainder of the Term for which he held the Houses; that the Defendants might be decreed to grant him a Lease of the piece of Ground for the remainder of that Term; and that they might be restrained, by Injunction, from entering up Judgment, or taking out Execution in the Action of Ejectment.

The Answer, and the Evidence in support of it, admitted that the application had been made as stated by the Bill; but said that it was rejected, because the project would have injured the Navigation of the Creek.

Mr. Sugden and Mr. Warwick for the Plaintiff:—

If we can satisfy the Court that the Case made by the Bill and the Evidence in support of it is true, the only point in the Cause is, whether the Corporation is not bound to grant the Plaintiff a Lease according to the Prayer of the Bill. Here the Corporation, acting by a Majority of its Members, at a regular Meeting, gives a License to the Plaintiff to do an act by which he incurs Expense. The Alterations which the Plain

1853.

MARSHALL
v.
Corporation of
QUEEN-
BOROUGH.

tiff was making must have been seen by the Members of the Body every day; and yet they allowed the Plaintiff to go on expending his Money, without attempting to stop him. They acquiesce for ten years in the Improvements, and then bring an Action of Ejectment. At Law, we admit, a Corporation can be bound only by an Instrument under its Seal; but, in Equity, it may be bound by a Memorandum entered in the Corporate Books. *Marwell v. Dulwich College* (a). In *Macher v. The Foundling Hospital* (b), the Lord Chancellor seems to think that a Corporation may be bound by acquiescence. It seems difficult to conjecture, upon any sound reasoning, why a Corporation should not be bound in the same manner as an Individual. There is the same injustice in a Corporation encouraging a Man to build on its Estate, and then refusing to fulfil the Promise on which the Party relied when he erected the Building. This Corporation has the same power of disposing of its Property as any Individual. It may either sell or lease all its Possessions.

As the Houses, at the expiration of the Lease, would belong to the Corporation, it was for the interest of both Parties that they should be protected from the water; so that we see a consistent Motive in the Corporation for granting this License. Five Witnesses swear that no Injury has been done to the Creek; and the Defendant's Witnesses swear so too.

It has been decided, at Law, that a Parol License, which has been acted upon, is not countermandable, unless the person who granted it pay all the expenses incurred by the other party in consequence of it. *Win-*

(a) 1 Treat. Eq. 3d ed. 305, n. (c). (b) 1 V. & B. 188.

ter v. Brockwell (c). We submit, therefore, that if our Case is made out by Evidence, this License, followed by the Expense which the Plaintiff has incurred, will authorize the Court to grant us the Relief prayed by the Bill.

1843.
MARSHALL
v.
Corporation of
QUEEN-
BOROUGH.

Mr. Treslove and Mr. Pemberton for the Defendants:—

A Contract, in order to be binding on a Corporation, must be under the Common Seal. *Taylor v. Dulwich Hospital* (d). And the same Rule is laid down by Lord Hardwicke, C. in *Winne v. Bampton* (e). Here there is no Contract under Seal. The circumstances of *Marwell v. Dulwich College* are not stated. All that that Case means is, that this Court will supply the want of the Seal if there is a corporate act which warrants the Seal being affixed. Here there is no corporate act at all. There may be the greatest collusion, if the Court should be of opinion that a Corporation can be bound by loose conversation.

Mr. Sugden, in reply, said that, in *Taylor v. Dulwich Hospital*, the Parties had been guilty of a breach of Trust, and that it was so stated by the Lord Chancellor in the outset of his Judgment; and he contended that, at all events, the Defendants were bound to stop the Plaintiff's expenditure.

The Case made by the Bill was not proved, and the Bill was dismissed. But the Vice-Chancellor (in the course of his Judgment), stated that, if a regular Corporate Resolution passed for granting an interest in a

(c) 8 East, 308.

(d) 1 P. W. 656.

(e) 3 Atk. 473.

1823.

MARSHALL
v.
Corporation of
QUEEN-
BOROUGH.

part of the Corporate Property, and, upon the faith of that Resolution, Expenditure was incurred, he was inclined to think that both principle and authority would be found for compelling the Corporation to make a legal grant in pursuance of that Resolution.

1823.

Award.

Where an Agreement of Reference provides that the Award shall be made by four persons, or any three of them, and the Award purports to be the Award of the four, but is executed by three of them only, it is void.

THOMAS v. HARROP (a).

IT was provided, in an Agreement of Reference, that the Award should be made by four persons, or any three of them. An Award was prepared, purporting to be the Award of the four Referees, but it was executed by three of them only.

The *Vice-Chancellor* held that it was no good Award: that it was not the Award of the four Referees, because it was signed by three of them only; and that it was not a good Award of those three, because it professed to be the Award of all the four Referees.

(a) Ex Relations.

S. C. 4 Aug. 170

WILLIS v. BLACK.

1823.
11th December,
and
3d February
1824.

Deed.
Construction.

BY the Settlement on the Marriage of *Richard Formby* with *Margaret Black*, one of the Daughters of *Patrick Black*, after reciting that, upon the Treaty for the Marriage, *Patrick Black* had agreed to give, as a Marriage Portion for his Daughter, the Sum of 1,400 *l.* payable as therein mentioned, and to make a further provision for his Daughter, *equal to his younger Child or Children*, as after-mentioned, and that *Margaret Black* was possessed of 1,400 *l.* Three per Cent Consolidated Bank Annuities, which she had transferred to *William Black* and *Richard Willis*; and that, upon the Treaty for the Marriage, it was also agreed that the 1,400 *l.* and such future provision to be made as aforesaid, and also the 1,400 *l.* Stock, should be settled upon the Trusts after expressed; it was witnessed that, in consideration of the Marriage and of the provision made by *Richard Formby* for *Margaret Black*, it was thereby agreed and declared that, after the solemnization of the Marriage, *William Black* and *Richard Willis* should stand possessed of the 1,400 *l.* Stock, and also of the 1,400 *l.* to be paid by *Patrick Black*, and the Bonds and Securities to be given for the same in manner after mentioned, and also of the further provision therein covenanted to be made by *Patrick Black* for *Margaret Black*; and it was thereby agreed that

P. B. on his Daughter's Marriage, settled a sum of Money on her and her Husband, and their Issue; and, after reciting that he had agreed to make a further provision for his Daughter, equal to his other younger Children, covenanted to settle, by his Will or otherwise, on the Husband and Wife, and their Issue, as great a Share of his Property as he should by his Will or otherwise provide for any of his other younger Children, to take effect on the

death of the Survivor of himself and his Wife; and, if he died intestate, or omitted to make such provision, that his Executors should pay to the Trustees as great a share of his Property as his younger Children should, in that event, become entitled to. Held, that the Trustees had no claim upon the Executors for advancements by the Settlor to his other younger Children in his lifetime, but only for a provision equal to that which the other Children became entitled to at his death.

1823.

WILLIS
v.
BLACK.

the 1,400*l.*, and also the further provision thereby covenanted to be made by *Patrick Black*, and the Money to arise from sale of the 1,400*l.* Stock to be made as therein mentioned, and all other the Estates and Effects intended to be thereby settled, as the same should from time to time, after the Solemnization of the Marriage, be received by *William Black* and *Richard Willis*, should be by them paid and advanced and placed out at Interest to and with *Richard Formby*, upon his giving or executing to them his Bond in a Penalty sufficient for securing such sum and sums of Money so from time to time paid and advanced to him; and it was also agreed and declared that *William Black* and *Richard Willis* should stand possessed of the 1,400*l.* and all such Bonds and Securities to be given for the same, and of such future provision as thereby covenanted to be made by *Patrick Black* in favour of *Margaret Black*, and of all other Estates and Effects to which she might at any time become entitled, and the Securities and Funds whereon or wherein the same should be placed out and invested, and also, after the solemnization of the Marriage, of the 1,400*l.* Stock, in Trust for *Richard Formby* for his life; and, after his decease, in Trust for *Margaret Black* for her life; and, after the decease of the Survivor of them, upon certain other Trusts therein mentioned. Then followed a Covenant in the following words:

“ And, for the considerations aforesaid, the said *Patrick Black* doth hereby, for himself, his Heirs, Executors, Administrators and Assigns, covenant, promise and agree to and with the said *William Black* and *Richard Willis*, their Executors and Administrators, in manner following, that is to say, that he the said *Patrick Black*, by his last Will and Testament,

1823.

WILLIS
v.
BLACK.

or otherwise, shall and will give, devise, bequeath, or otherwise settle and secure, to or in favour of the said *Richard Formby* and the said *Margaret* his intended Wife, and to and for the Issue of the said intended Marriage, upon the Trusts nevertheless aforesaid, as full and great a part and share of his Estates, Effects and Property as he shall by his said Will, or otherwise, give and provide to or for the use of any of his other younger Child or Children, *to take effect on the death of the Survivor of himself and his present Wife*; and also that, in case he, the said *Patrick Black*, shall happen to die intestate, or omit to make such provision or bequest to the use or in favour of the said *Richard Formby* and the said *Margaret* his intended Wife, and to and for the Issue of the said intended Marriage, the Heirs, Executors or Administrators of the said *Patrick Black* shall and will pay, or cause to be paid, to the said *William Black* and *Richard Willis*, or the Survivor of them, his Executors or Administrators, as full and great a part and share of the Estates, Effects and Property of the said *Patrick Black*, as or to which his younger Child or Children shall, *in that event*, become entitled, upon the Trusts nevertheless, and for the intents and purposes hereinbefore declared and expressed, concerning the said sums of Money, Estates and Effects hereinbefore settled as aforesaid, or such of them as shall be then existing and capable of taking effect (a)."

There was no Issue of the Marriage.

Mrs. *Formby* died in her Father's lifetime. By her Will, and a Codicil thereto, made in pursuance of the

(a) This Settlement contains some inaccuracies, but it is correctly copied from the Briefs.

1823.

WILLIS
v.
BLACK.

Power reserved to her by the Settlement, she appointed *Richard Formby* and *Miles Formby*, and the Defendant *Edith Black*, her Executors; and she gave and appointed to them all the Trust Property to which she was entitled, or which she could dispose of, upon the Trusts mentioned in her Will.

Patrick Black, by his Will, dated the 14th of September 1809, gave unto *Edith Black* and *George Monk*, their Heirs, Executors, Administrators and Assigns, all his real and personal Estates and Property whatsoever and wheresoever, upon Trust to make sale of such parts of the same as were saleable, and to collect and get in the other parts, and, with the monies to arise therefrom, to pay 500 *l.* to the Trustees of the Settlement, to be applied by them to the Trusts thereof; 500 *l.* to *William Black*, his Executors, Administrators and Assigns; and 500 *l.* to *Edith Black*, her Executors, Administrators and Assigns; and he declared that he did so for the purpose of making an equal distribution of his Estate and Effects amongst his Children, he having already advanced to *John Black* the sum of 500 *l.* more than any of his other Children; and the remainder of the Money to arise as aforesaid he directed his Trustees to divide into four equal parts, and to pay one-fourth part to the Trustees of the Settlement, and the three other fourth parts to *William Black*, *Edith Black*, and *John Black*.

Patrick Black died on the 5th of November 1816, having had four Children, namely, *Andrew Black*, his eldest Son, who died in his lifetime, and the two other Sons and the Daughter named in his Will, who all survived him.

After the execution of the Settlement the Testator transferred 100 *l.* Long Annuities, and gave some sums of Money to each of his three surviving Children, without making any addition to the provision he had made for Mrs. *Formby* by the Marriage Settlement.

1823.

WILLIS
v.
BLACK.

The Bill was filed by *Richard Willis*, and *Richard* and *Miles Formby* against *Monk*, and the Testator's surviving Children ; and it prayed that the Covenants contained in the Settlement might be specifically performed, that an Account might be taken of all sums of Money advanced and paid by the Testator to, for, or on account of other Stock transferred into the names of his surviving Children ; that the whole of his Property might be so divided as that Mrs. *Formby's* share might be settled upon the Trusts of the Settlement ; that an Account might also be taken of all sums of Money which had been advanced by the Testator to his surviving Children ; and that the Plaintiffs might be paid such sum of Money as would be equal in amount to such share of Interest as *Richard Formby* should be found entitled to, to make him equal to the surviving Children.

The Cause was first heard by the *Vice-Chancellor* on the 13th of May 1820. The Decree declared that the Testator was bound by the Covenants in the Settlement to make provision for Mrs. *Formby*, her Husband and the Issue of the Marriage, including the 1,400 *l.* advanced at the time of the Marriage, equal to the share of any younger Child, either in his real or personal Estate, by provision or gift in his lifetime, or by his Will, to take effect upon his death. And it was referred to the *Master* to inquire what provision or gifts were made by the Testator in his life, or by his Will, in favour of his younger Children out of his real and personal Estate.

1824.

WILLIS

v.

BLACK.

that can be put upon the Covenant is, that the further provision for Mr. and Mrs. *Formby* was to take effect on the death of the Survivor of Mr. and Mrs. *Black*. The first Clause of the Covenant contains a substantive, independent Covenant, which is not qualified or restrained, but enforced by the subsequent Clause: and, in an Action brought upon it by the Covenantees, it would not be necessary to state the second branch in the Declaration. *Howell v. Richards* (a). The reference to the death of the Father proves that it was intended that a portion given to any of the other younger Children, should create a right in Mrs. *Formby* to an equal portion. It was never meant that the only provision for the younger Children, which was to give Mrs. *Formby* a right to an increase of her Fortune, was one which was to take effect at the death of the Settlor; but that that was the period at which the whole amount of the provisions for younger Children was to be ascertained.

The only difficulty, in the second Clause, arises upon the words, "in that event." Your *Honor* understands those words to relate only to the death of the Settlor. We contend that they mean, "in the event of my Death intestate, or having omitted to make the provision for you which I have bound myself to do by the prior Clause of the Covenant." There is no single or particular event mentioned in the Covenant, to which those words can be referred; and, therefore, they must be construed "under those circumstances;" that is, the Portion of Mrs. *Formby* shall, at the death of her Father, be equal to the Portion which the other younger Children shall have received up to that time,

(a) 11 East, 633.

whether derived under Deed, Will or Intestacy. Why did the Settlor refer to the omission to make provision, if he had not intended, that Portions given in his lifetime should be taken into account? By this construction, all the parts of the Covenant are consistent with each other and with the Recitals of the Deed. If the other construction were adopted, what absurdities would follow; for, suppose he had given in his Will all his Property except 50*l.* amongst his other younger Children, then Mrs. *Formby* would not have claimed more than a Share of this 50*l.* and the Settlor would be enabled to commit a Fraud upon the Covenant.

1824.

WILLIS
v.
BLACK.

The *Vice-Chancellor*, without hearing the Counsel for the Defendants, delivered Judgment as follows :

The question upon this Covenant is, whether it was the intention of the Testator to bind himself to give to Mr. and Mrs. *Formby* as large a share of his Property as he should at any time devise or give to any other of his younger Children, or only as large a share of his Property as any other of his younger Children should, by his gift or devise, become entitled to at his death, or at the death of the Survivor of himself and his Wife. The expressions in the first Clause of the Covenant may be considered as ambiguous; but it is clear, in the second Clause, that Mr. and Mrs. *Formby* were only to take such part or share as any other of his younger Children should become entitled to in the event of his death; and he had, therefore, full power during his life to make a present disposition of any part of his property to any of his younger Children. The language of his Will shows that this was his own conception of the Covenant.

1812.
12th December.

COOPE v. BANNING.

Will.
Construction.

Testator, after giving some Legacies, directs payments to be made to his Devises, as under; and then mentions certain Persons, and the Sums to be paid to them, and gives the Residue to all his Devises above mentioned, in proportion to their Legacies. Every one of the Legatees is entitled to a Share.

JOSHUA ROSE made his Will as follows:—"I give and devise unto *Thomas Banning* of *Liverpool*, Postmaster, and *Charles Clements* of *Liverpool*, Attorney at Law, all my real and personal Estates, of what kind soever, in Trust to sell or exchange any part thereof, and, as speedy as can with propriety be done, for the most money that can be obtained; and first, to discharge all my just Debts and Funeral Expenses out of the produce arising from the sale of my Property; and, after that is done, it is my will that my Trustees above named do pay unto *Jane Thomas*, otherwise *Jane Anderson*, 1,000 *l.* and to her Daughter *Eliza* and Son *Joshua*, 50 *l.* each, annually, until they arrive to the age of 21 years, at which period they, or the survivor of them, shall receive the principal Sum of 2,000 *l.*; and I also direct my said Trustees to pay unto my Devises as under, as soon as they can:

"To the Son of *Thomas Banning*, named *Joshua*, or his Guardians, 1,000 *l.*; and to Captain *Grantham Hodgson*, 1,000 *l.*; and to my Nephew *William Denck*, 1,000 *l.*; and to my Niece, *Ellen Lunt*, Wife of *Thomas Lunt*, 1,000 *l.*; and to *Hannah Potter*, 1,000 *l.*; and to her Brother *John Potter* and her Sister *Elizabeth Potter*, 500 *l.* each; and to *Ellen Lunt*, Daughter of *Ellen Lunt*, 500 *l.*; and the rest, residue and remainder I give unto all my Devises above named, share alike, in proportion to their several Legacies, first deducting from the Principal, 200 *l.* to be taken to the use of my Executors, each a moiety, namely, *Thomas Banning* and *Charles Clements*, to be my true and lawful Executors of this my last Will."

1843.

COOPER
v.
BANNING.

The Bill was filed by *Jane Anderson*, and her Son and Daughter (who were Infants) against the Executors and the other persons beneficially interested under the Will; and it prayed that the Plaintiffs might be declared to be entitled to distributive shares of the Testator's residuary Estate, in proportion to their several Legacies, equally with the other Legatees named in the Will.

Mr. *Bell* and Mr. *Koe*, for the Plaintiffs, said, that by the word "Devisees" the Testator meant "Legatees;" and that, as he had given the residue of his Property to *all* his Devisees above named, none of the Legatees named in the Will could be excluded from a share, and that therefore the Plaintiffs, as well as the other Legatees, were entitled to a share of the residue.

Mr. *Hart*, Mr. *Agar*, Mr. *Sugden*, Mr. *Roupell*,
Mr. *Blenman* and Mr. *Cooper*, for the Defendants :—

The Plaintiffs are not Devisees within the intention of the Testator. Mrs. *Anderson's* Children were to have nothing but annual payments unless they attained the age of 21 years. Their Legacies were contingent until that event. The Testator contemplated an immediate distribution of his Property; and with that view directs *Joshua Banning's* Legacy to be paid to his Guardians. But there was no person to whom the Legacies given to Mrs. *Anderson's* Children could be paid.

The Testator, after directing payments to be made to his Devisees as under, proceeds to mention certain persons, and he then uses the expression "my Devisees above-named." He never calls the Plaintiffs Devisees. The only persons whom he so calls are the

1853.

COOPER
v.

BANNING.

other Legatees; and therefore by the expression "my Devisees above named," he must have meant the persons whom he had *called* Devisees.

From the manner in which the Will is divided into paragraphs, it clearly appears that the Testator meant to comprise, under the description of his Devisees above-named, those persons only whom he had before mentioned as his Devisees as under (a).

THE VICE-CHANCELLOR:—

The Testator gives his residuary Estate to all his Devisees above named, share and share alike, in proportion to their several Legacies. By the term Devisees he plainly means Legatees. It is argued that, from the manner of writing and pointing the Will, not all the Legatees above named, but some of those Legatees only, are to take the residue. I think the inference derived from the form of the Will much too slight to be opposed to clear and unequivocal expressions.

(a) The words "as under" seem to be referred to the words "to pay;" and the meaning of the expression to be, "I direct my Trustees to pay to my Devisees such sums of Money as are under mentioned."

DAWSON v. SADLER.

1823.
18th & 19th
December.

Award.
Jurisdiction.

THE Bill prayed that an Award might be set aside, and the Defendants restrained from proceeding to recover the Sum awarded against the Plaintiff.

The Plaintiff and Defendants had agreed by Deed to refer an Action in Replevin and all matters in dispute between them to the arbitration of a certain person; and that the Award and the Submission should, at the instance of either party, be made an order of the Court of Chancery, or a Rule of the Court of King's Bench. On the 1st November 1823, the Arbitrator made his Award, by which he directed a considerable Sum to be paid by the Plaintiff to the Defendant *John Sadler*.

On the 26th of November 1823, the Plaintiff filed his Bill in this Cause against *John Sadler*, the Sureties in Replevin, and the Arbitrator, alleging Fraud and many other objections to the Award. Neither the Submission nor the Award had been made a Rule of either Court, at the time when the Bill was filed. The Bill charged that the Defendant, *John Sadler*, threatened to procure the Award to be forthwith made a Rule of this Court, or the Court of King's Bench, and to commence Proceedings at Law against the Plaintiff to recover the Sum awarded to be paid by him.

Injunction to stay Proceedings on an Award, on the ground of Fraud and Corruption in the Arbitrator, refused, where the Submission was, within due time, made a Rule of the Court of King's Bench, although the Bill was filed before the Submission was made a Rule of that Court, and although it might, according to the Agreement, have been made either a Rule of this Court, or of the Court of K. B.

On the day on which the Bill was filed, the Plaintiff gave Notice of a Motion for an Injunction according to the Prayer of the Bill. On the 28th of November 1823, before the Motion could be made, the Defendant *John*

1823.

DAWSON

v.

SADLER.

Sadler made the Submission a Rule of the Court of King's Bench.

The Motion for an Injunction was now made; and it was objected, for the Defendants, that this Court had no jurisdiction.

Mr. *Heald* and Mr. *Girdlestone*, junior, for the Plaintiff:—

This Court has jurisdiction to relieve against this Award:

1st. Because the Submission was not made a Rule of the Court of King's Bench before the Bill was filed. Where, as in this Case, the agreement is that the Submission may be made a Rule either of this Court or of a Court of Common Law, and a Bill is filed in this Court, impeaching the Award, before the Submission is made a Rule of the Court of Common Law, the party insisting on the Award cannot, by subsequently making it a Rule of the Court of Law, oust this Court of its jurisdiction. That question occurred in — *v. Mills* (a), but was not there decided. In *Gwinett v. Bannister* (b), it was held, the jurisdiction to set aside an Award is confined to the Court in which the Submission is made a Rule. But the present Case is distinguished from *Gwinett v. Bannister*, by the fact that the Bill was filed in this Court before the Award was made a Rule of the Court of King's Bench.

2dly, Because the Agreement in this Case was, that the Submission should be made a Rule either of the Court of King's Bench or of the Court of Chancery,

(a) 17 Ves. 419.

(b) 14 Ves. 530.

at the option of either Party; and the Plaintiff, by filing this Bill, did that which was equivalent to making the Submission a Rule of this Court. The Plaintiff has, therefore, exercised the option, which was given to him by the Agreement, of giving this Court, and not the Court of King's Bench, the jurisdiction as to this Award.

1823.

DAWSON
v.
RADLER.

3dly, Because the Complaint in this Case being of Fraud and Corruption in the Arbitrator, it is an excepted Case under the latter words of the 1st section of the Stat. 9 & 10 W. III. c. 15 (c). This Court had jurisdiction before the Statute to set aside an Award to which there was an Objection of that kind. There is nothing in the Act which makes it imperative on a Party in such a case to take Proceedings in the Court of Law in which the Submission has been made a Rule, instead of having recourse to the original jurisdiction of this Court. *Ward v. Periam* (d). The object of the Legislature was not to divest this Court of its jurisdiction, but to give the Party who wished to avail himself of a just Award the summary remedy of process of Contempt to compel the performance of it.

Mr. Wakefield, for the Defendants.

(c) The Statute directs, that the Court, of which the Submission has been made a Rule, shall issue Process against the Party neglecting or refusing to perform the Award; and then proceeds in these words: "Which Process shall not be stopped or delayed in its execution by any Order, Rule, Command or Process of any other Court, either of Law or Equity, unless it shall be made appear on Oath to such Court, that the Arbitrators or Umpire misbehaved themselves, and that such Award, Arbitration or Umpirage was procured by Corruption or other undue means."

(d) 2 Eq. Ca. Abr. 91, and more fully stated in a Note to *Auriol v. Smith*, 1 Turner's Rep. 131.

1823.

DAWSON
v.
SADLER.

The VICE-CHANCELLOR :—

The Authorities referred to have, in effect, determined the Questions which are here raised. No Court has jurisdiction to set aside an Award under the Statute, except the Court in which the Submission is made a Rule; and there the application must be made before the last day of the next Term after the Award. It is said, that the filing of this Bill is equivalent to making the Submission a Rule of this Court, and that the Bill was filed before the last day of the next Term after the Award. I am of opinion that the filing of this Bill is not equivalent to making the Submission a Rule of this Court; first, because it is not within the language of the Statute; and next, because it is not within the principle of the Statute; the object of which plainly was, to create a summary jurisdiction for the decision of Awards.

It appears that, in this Case, the Submission was made a Rule of the Court of King's Bench on the 28th Nov. I think that, however, not material as to the question of Jurisdiction upon this Bill. In the late Case of *Davis v. Getty* (e), I had occasion to state my Opinion; that this Court could not acquire jurisdiction from the circumstance that the Submission was not actually made a Rule of any Court; because either Party has a right to take this step, and cannot transfer the Jurisdiction by neglecting to do an act within his own power.

It has been argued that, inasmuch as this Bill insists that the Award was made in consequence of Fraud and Corruption in the Arbitrator, by the effect of the concluding words of the first section of the Act this

(e) Ante, 411.

1823.

DAWSON
v.
SADLER.

Court has a general Jurisdiction as upon an excepted Case. I apprehend that this Argument proceeds upon a clear misconception of the Statute. The second section gives to the Court where the Submission is made a Rule an authority to set aside an Award made by Corruption or undue means. These words plainly comprise the Fraud and Corruption of the Arbitrator, and were doubtless intended to reach every Case where the Award ought to be set aside. The first section enables the Party in whose favour the Award is made to enforce obedience to it by process of Contempt from the Court where the Submission is made a Rule, unless it shall appear upon oath that the Arbitrators misbehaved themselves, or that the Award was procured by Corruption or other undue means. The very same words, therefore, are used here as are used in the second section, and plainly mean to comprise the Fraud and Corruption of the Arbitrator, and every other Case where the Award ought to be set aside; because it could not be the intention of the Legislature that any such Award should be enforced. The whole Act taken together means this, that the Party in whose favour the Award is made may enforce it by the process of the Court where the Submission is made a Rule, unless it shall appear to that Court that it ought to be set aside as unduly made, and in such case the same Court shall not merely refuse the aid of its Process, but, if complaint be made within the time limited, shall actually proceed to set it aside.

Motion refused.

1824.

DAWSON
v.
SADLER.

After this Motion each of the Defendants demurred to the whole Bill, except the Charges of Fraud and Corruption, which they answered.

20th April.

*Award.
Pleading.*

To a Bill to set aside an Award charging Fraud and Corruption in the Arbitrator, the Defendant answered as to the Fraud and Corruption, and demurred to the rest of the Bill. Held, that the Answer overruled the Demurrer.

The VICE-CHANCELLOR:—

These Demurrers bring before me, in a grave form, the same Questions as occurred in this Cause upon the Motion for an Injunction. I was then, and am now of opinion that, where by the Agreement of Reference the Submission is to be made a Rule of any Court, there the only course of Proceeding to impeach the Award is to make the Submission a Rule of that Court, and to apply summarily for its aid. It makes no difference that there are Charges of Fraud and Corruption in the Arbitrator. If the Agreement of Reference be that the Submission shall be made a Rule or Order of this Court, this Court does not thereby acquire a Jurisdiction over the Award by Bill, but the Parties must proceed summarily under the Statute.

It is a necessary consequence of these principles, that the Demurrers ought to have extended to the whole Bill, and that the Answers as to the Charges of Fraud and Corruption overrule the Demurrers.

The *Vice-Chancellor* said he was disposed to give the Defendants leave to amend their Demurrers and Answers, by making them general Demurrers to the whole Bill. But a compromise took place, and no further Proceedings were had in the Cause.

RIST v. HOBSON.

1824.
16th January.

Pleading.

THE Bill was filed by the Vendor against the Purchaser of an Estate, to compel a specific Performance of the Agreement for the Purchase. It stated that the Agreement was reduced into Writing, but did not allege that it was signed by either of the Parties; and for that reason the Defendant put in a general Demurrer.

If a Bill for the specific Performance of an Agreement state that the Agreement was in writing, Signature will be presumed.

Mr. *Blackburne*, in support of the Demurrer, referred to the fourth section of the Statute of Frauds, and said that, before an Action could be brought, or a Bill filed upon any Agreement, the Statute distinctly required that there must be not only some Memorandum or Note of it in Writing, but that such Memorandum or Note, must be signed by the Party against whom the Action is brought or the Bill is filed.

Mr. *Heald* and Mr. *Merivale*, in support of the Bill, said, that it was not necessary that the Bill should allege that the Agreement had been signed, or even that it had been reduced into Writing; and that, at Law, it was sufficient if the Declaration stated an Agreement generally, without averring that it was in writing (a).

The *Vice-Chancellor* said, that the Bill contained an allegation that there was an Agreement in Writing: that, if the Paper was not signed, it was not an Agree-

1824.

RIST

v.

HOBSON.

ment; and that, therefore, Signature must be presumed until the contrary was shown.

Demurrer overruled (b).

(b) In the course of the Argument in this Case, the propriety of a Defendant availing himself of the Statute of Frauds by way of Demurrer was discussed, and the Cases of *Whitchurch v. Bevis*, 2 Bro. C. C. 559, and *Redding v. Wilkes*, 3 Bro. C. C. 400, were referred to.

1824.

28th January.

ASPINALL v. PETVIN.

Devise.

Implication.

Devise of Lands to Trustees, upon Trust to pay one Moiety of the Rents to Devisor's Wife for her life, and the other to his only Son; and after the Wife's death to convey to the Son in Fee; but if the Son died without Issue in the Wife's life, to convey to Devisor's Nephew in Fee. The Son died without Issue in the Wife's life. She is not entitled for Life, by Implication, to the Moiety devised to the Son.

THE Bill prayed that it might be declared that, according to the true Construction of *Humphrey Aspinall's* Will, the Plaintiff *John Aspinall* became entitled, on the death of *William Heron Aspinall*, to one moiety of the Rents of the Hereditaments devised by the Testator, during the life of the Testator's Widow.

The Widow put in a general Demurrer for want of Equity to part of this Bill.

On the argument of the Demurrer, the Questions were, whether, on *W. H. Aspinall's* death, the Widow became entitled to an Estate for life, by implication, in the Moiety of the Testator's real Estates, which was not expressly devised to her, or whether, on that event, the Plaintiff became entitled to it.

The Will was as follows:

"I give and devise to my good Friends *Thomas Skinner* and *Richard Knight* all and every my Freehold and Copyhold Messuages, Lands, Tenements and Here-

1824.

 ASPINALL
 v.
 PETVIN.

ditaments whatsoever, to hold to them the said *Thomas Skinner* and *Richard Knight*, and their Heirs, upon Trust to receive and take the Rents; Issues and Profits thereof, and to pay and apply one moiety or half part thereof to my dear Wife *Elizabeth Aspinall*, during her natural life for her own use, and to pay and apply the other moiety or half part thereof for the use and benefit of my Son *William Heron Aspinall*, during his minority, in such manner and proportion as they in their discretion shall think proper; and, from and after he shall have attained his age of twenty-one years, to pay the said moiety of such Rents and Profits to him for his own use; and, from and immediately after the death of my Wife *Elizabeth Aspinall*, upon Trust to convey and surrender all my said Freehold and Copyhold Messuages, Lands, Tenements and Hereditaments unto my Son *William Heron Aspinall*, his Heirs and Assigns for ever; but if my said Son shall depart this life without Issue in the lifetime of my said Wife, then upon Trust, after the death of my said Wife, to convey and surrender the same unto my Nephew *John Aspinall*, of *Newborough*, near *Ormskirk*, in the County of *Lancaster*, his Heirs and Assigns for ever. And it is my will and meaning that, in case my said Wife *Elizabeth Aspinall* shall depart this life before my said Son shall attain the age of twenty-one years, that my said Trustees and their Heirs shall continue to receive the Rents and Profits of my said Freehold and Copyhold Estates, and apply the whole thereof, or so much thereof as they shall deem necessary, for the use and benefit of my said Son, till he has attained that age. And I do hereby authorize and empower my said Trustees and their Heirs to let, set and manage my said Freehold and Copyhold Estates, during the continuance of the Trust hereby in them reposed, in such

1824.

ASPINALL

v.

PETVIN.

manner as they shall judge most for the benefit of the Persons interested therein."

In 1792 the Testator died, leaving *W. H. Aspinall*, his only Child, his Heir at Law. In 1796 *W. H. Aspinall* attained the age of twenty-one years; and, in October 1804, died intestate and without Issue, leaving the Plaintiff (who was the Testator's Nephew mentioned in his Will) his Heir at Law, and who thereupon became the Heir at Law of the Testator.

The Bill alleged that, upon the death of *W. H. Aspinall*, the Plaintiff became entitled to one moiety of the Testator's real Estates, or to receive one moiety of the Rents thereof, during the lifetime of the Widow, and to the whole of those Estates after her decease.

Mr. *Sugden* and Mr. *Palmer* in support of the Demurrer:—

The Testator gives, expressly, one moiety of his Freehold and Copyhold Estates to his Wife for her life, and the other to his Son, generally, without any words of restriction. After the death of the Wife, the Son is to have a Conveyance in fee made to him of the whole Estate. But if he died without Issue in the lifetime of the Wife, the Trustees are directed to convey the Estate to the Plaintiff. But he is not to take any thing until after the death of the Wife. There is no Devise of the moiety given to the Son. The question is, whether under these circumstances there is not a necessary implication in Law that the Widow is to take that Moiety, as well as the one which is expressly devised to her?

One point is quite clear upon the authorities, that, if a Testator devise to his Heir after the death of his Wife,

1824.

ASPINALL
v.
PETVIN.

the Wife takes for life by implication; because the Devise to the Heir shows an intention that he is not to take until after the death of the Wife. The Rule is the same where the Devise is to a Stranger after the death of the Wife. Considering the Rule to be as we have stated it, it is clear that the Widow is entitled to the moiety given to *W. H. Aspinall*; for it is devised to the person who must be the Heir at Law of the Testator, as well as of his Son, at the time when the Devise is to take effect. The question is not who is the Heir of the Testator at his death, but who is his Heir at the time when the Devise takes effect. There is no Devise to the Nephew, except in the event in which he must be the Heir of the Testator, namely, the death of the Son without issue, and therefore the principle of the Rule applies in this Case. In the Case of *Doe v. Bowling* (a) it was admitted in the argument, in reply to a question put by *Abbott*, C. J. that on the death of the three Daughters without issue, the Heir at Law of the Survivor would be one of their three Uncles mentioned in the residuary Clause, and it was held that the Husband did take an Estate for life by implication. There is a Case in the Year Book, 13 H. 7. fol. 17. in which a man devised his goods to his Wife, and that, after the decease of his Wife, his Son and Heir should have the House where his Goods were; and it was held that this was a good Devise of the House to the Wife for her life by implication. This is a very strong Case, because the Goods were expressly given to the Wife for life, and the House was not expressly given to her. This Case is referred to in *Bro. Ab. Title Devise*, pl. 52. There is another Case, pl. 48, which is as follows: "A man wills that *J. S.* shall have his Land after the death of his Wife, and dies; there the Wife

(a) 5 B. & A. 722.

1824.

ASPINALL
v.
PETVIN.

of the Devisor, by these words, shall have the Land for term of her life, *ratione intentionis voluntatis*." Lord Chief Justice *Vaughan*, in giving judgment in *Gardner v. Sheldon* (b), states the former of these two Cases as an authority. But he endeavours to overrule the latter of them, by drawing a distinction between a Devise to a stranger, and to the Heir. The Case of *Horton v. Horton* (c) is said not to have been determined, and is clearly overruled by *Roe v. Summerset* (d). In late Cases implications have been made which would not have been made in former ones: as in *Tenny v. Agar* (e) and *Romilly v. James* (f). In the Case in *Bro. Ab.* pl. 48, the Law was held the same in the Case of a Stranger as in the Case of an Heir. Under the authority of this Case and of *Roe v. Summerset*, we contend that the Widow is entitled to an Estate for life, by implication, in the Son's Moiety. The other point in this Case is, whether the Widow, having had one moiety of the Rents given to her expressly, is not precluded from taking any thing more by implication. The Case in 13 Hen. 7, is an express authority for answering this question in the negative. For there the express gift of the Goods did not prevent the Widow from taking the House by implication. And the same doctrine is laid down by *Vaughan, C. J.* (g). Besides these moieties are as distinct as any Estates in severalty; and the Nephew is to take nothing but the entirety.

Mr. *Agar* and Mr. *Spence*, for the Plaintiff:—

The Question which has been argued for the Defendant does not arise; for this is a mere Trust Estate.

(b) *Vaughan*, 263.

(c) *Cro. Jac.* 74.

(d) 5 *Burr.* 2608; and *S. C.* 2 *Black.* 692.

(e) 12 *East*, 253.

(f) 1 *Marshall*, 592.

(g) *Vaughan*, 265. 266.

1894.

ASPINALL
v.
PETVIN.

The Rents of one moiety are to remain in the hands of Trustees until the death of the Wife, for the benefit of the Heir. An Estate by implication is given only where there is no Tenant to the Freehold. Here there is no necessity for giving such an Estate; because the Trustees are Tenants of the Freehold. To exclude the Heir there must be a necessary implication that he is not to take. Is it a necessary implication that, because the Nephew is to have the legal Estate conveyed to him after the death of the Widow, he is not to enjoy one moiety of the Rents during her life? The Law upon this subject is very clearly laid down by *Vaughan, C. J. (h)*. That the same doctrine is still Law, appears from the Case of *Dyer v. Dyer (i)*.

Mr. *Sugden*, in reply, said, that it made no difference in this Case that there was a Devise to Trustees, for that the Court would put the same construction upon the Devise in question as it would upon a direct Devise to the Parties.

The VICE-CHANCELLOR :—

If this Case involved the general points which have been urged on the part of the Defendant, it would undoubtedly have been my duty to send it for the opinion of a Court of Law. But these points do not arise; and there is, in this Case, nothing which I can send to a Court of Law.

This Testator devises his Estate to Trustees, upon trust, after the death of his Widow, to convey it to his Son, and, if his Son happen to die without Issue living the Widow, then, after the death of his Widow, to convey

(h) See *Vaughan*, 262.

(i) 1 Mer. 414.

1824.

ASPINALL

v.

PETVIN.

the Estate to his Nephew; and, as to the interim Rents and Profits, upon Trust to pay a moiety to the Widow for her life, and the other moiety for her life to the Son. He happens to make no further disposition of this moiety of the Rents and Profits, if the Son should chance to die before the Widow: and the Question is, whether the Court is therefore to intend that he meant the Widow to take that moiety also. There is neither Authority nor Principle for such an implication. It has been argued that it is now to be considered as the Rule of Construction, that, if an Estate be given not to the Heir, but to a Stranger, after the death of *A*, *A*. takes by implication. I cannot allow such a proposition to pass without entering my Protest against it. I am not aware there is any Authority to support it. If a Testator gives to his Heir, after the death of *A*, he plainly means that his Heir should not take during the life of *A*, and, having named no other person to take during the life of *A*, it is necessarily to be implied that he means *A*. to take during his own life. But if the Testator gives to a Stranger after the death of *A*, it does not plainly and necessarily appear from thence that he means that his Heir should not take during the life of *A*; and it is against the first principles of Construction to disinherit an Heir by conjecture.

WHYTE v. O'BRIEN.

1824-
27th January.

THE Court was moved, on behalf of the Plaintiff, for an Injunction to restrain the Defendant from proceeding to execution upon a Verdict obtained by him in an Action at Law against the Plaintiff.

*Set-off.
Injunction.*

The Bill stated that, since the Verdict had been given against the Plaintiff, he had acquired by purchase Bills of Exchange accepted by the Defendant to an amount exceeding that for which the Verdict had been obtained. There was an Affidavit of this fact.

A Person against whom a Verdict had been obtained, having afterwards acquired a Demand to a greater amount against the Party who obtained it, is not entitled to an Injunction to restrain Proceedings on the Verdict.

Mr. *Sugden* and Mr. *Wilson* for the Plaintiffs.

Mr. *Simpkinson* for the Defendant.

The VICE-CHANCELLOR:—

The Question is, whether a Bill of this kind can be maintained. At Law, where a Defendant claims a set-off, the truth of his Claim comes to be tried at the same time with the demand raised by the Action, and is decided by the same Verdict. If after the Verdict the Defendant acquires for the first time a cross demand against the Plaintiff, he cannot, for that reason, by any proceeding at Law defeat or delay the Plaintiff from the benefit of his Verdict. It is not reasonable that a cross demand thus subsequently acquired should delay the Plaintiff from the benefit of his Verdict, until the validity of this demand is ascertained by a second Trial; and, in this Case, Equity must follow the Law. Equitable set-off is where, by reason of the nature of the cross demand, there can be no set-off at Law. Here the demand is purely legal.

Motion refused, with Costs.

1824.
27th January.

Tenant for life.

Tenant for Life of Real Estates under a Will having expended Money in finishing a Mansion-house which the Testator had begun, but left unfinished, and also in repairing the Mansion-house which had been damaged by dry rot, the Court, in a Suit for administering the Trusts of the Will, directed an Inquiry whether it was for the benefit of all Parties interested that the Mansion-house should be finished, but refused an Inquiry as to the Repairs; and said if it was found for the benefit of all Parties interested, that the Mansion-house should have been finished, and there was no personal Estate applicable, the Expense should be a Charge on the real Estates.

HIBBERT v. COOKE.

THIS was a Bill to administer the Trusts of the Will of *J. Cooke*. *Sarah Cooke* the Widow of the Testator was one of the Defendants. She was Devisee for life of his real Estates and of his residuary personal Estate, with Remainder to his Son for life; with Remainder to the Son's Children, absolutely, as Tenants in common. The Will directed the leasehold Estates of the Testator to be sold.

It appeared, by the Answer of the Widow, that at the time of the Testator's death he was engaged in building a new Mansion-house which was then nearly finished, and that she had proceeded to complete it; and that she had afterwards expended a considerable sum in repairing it, in consequence of its being damaged by the dry rot. Her Answer likewise stated that the Leasehold Estates of the Testator had been underlet by him at small Ground Rents, on Leases which had but few years to run at the time of his death and were for much shorter Terms than his Lease; that it would have been for her benefit, as Tenant for life, had the Leaseholds been sold immediately after the death of the Testator; but that, with a view to the benefit of her Son and his Children, she, as an Executrix under the Will, had concurred in delaying the sale till the Underleases had expired, although by this delay her own Income as Tenant for life had been diminished. She therefore claimed to be entitled to Compensation, out of the general residuary Estate, in respect of the sums thus laid out

personal Estate applicable, the Expense should be a Charge on the real Estates.

by her on the Mansion-house, and also in respect of the diminution of her Income by the delay in the sale of the Leasehold Estates.

1824.

HIBBERT
v.
COOKE.

The Cause now came on to be heard ; and the only question was as to these Claims by the Widow.

Mr. *Hart* and Mr. *Timney* for the Plaintiffs.

Mr. *Heald* and Mr. *Purvis* for the Defendant, the Widow, mentioned the Case of *Graves v. Graves*, at the Rolls in March 1822, in which an Inquiry was directed as to Sums expended by a Widow, Tenant for life, in effecting substantial Repairs on the Mansion-house. The Registrar's Books had been searched to ascertain what had been done on the *Master's* Report in that Case ; but no further Entry appeared beyond the Order which directed the Reference to the *Master* to make the Inquiry as to the Sums expended.

Mr. *Wray*, *Amicus Curie*, stated that he was one of the Counsel in the Case of *Graves v. Graves* ; and that the Inquiry had been directed in that Case to ascertain the Amount, in order that the Widow might obtain a Security by way of Mortgage of the Estates.

Mr. *Horne*, Mr. *Roupell*, Mr. *Spence* and Mr. *Theobald* for the various other Parties, Defendants, interested under the Will, did not oppose an Inquiry.

The *Vice-Chancellor* referred it to the *Master* to inquire whether it was for the benefit of all Parties interested in the Testator's Estate that the Mansion-house should have been finished ; and if so, then to inquire what had been properly expended by the

1824.

HIBBERT

v.

COOKE.

Widow in that respect. And also to inquire whether it was for the benefit of those who might become entitled to the residuary personal Estate after the death of the Widow, that the Sale of the Leasehold Estates should be delayed until the expiration of the Under-leases granted by the Testator; and in case the Trustees should find that the Delay was for their benefit, he was to inquire further, what Compensation the Widow would be entitled to in respect of her loss of Income by the delay of Sale from the death of the Testator until the present time; and what she would be further entitled to in respect of her future loss of Income from the present time until the expiration of the Under-leases.

But his *Honor* refused to make any Order with respect to the Expense occasioned by the Dry Rot, considering that it was an Expense to which a Tenant for Life choosing to occupy a Mansion-house, must submit. And his *Honor* also observed, that upon the principle of this Order he must have directed the Inquiry, even if there had been no personal Estate applicable to satisfy the Expense; and must have directed the Expense to be a Charge upon the real Estate.

CASES IN CHANCERY.

555

NAYLOR v. WINCH.

1824.
27th, 28th, 29th
January.

JOHN WINCH, by his Will, dated the 8th of March 1796, bequeathed to the Plaintiff, then the Wife of *R. Mealy*, an Annuity of 600*l.* per annum, to commence six months after his decease, *for her life, and the Issue from her Body lawfully begotten; in failure of which to revert to his Heirs*; and he requested his Friends, *N. E. Kindersley* and *T. Cockburn*, to act as Trustees for her, so that the Annuity might be secured for her sole use and benefit, and that it might be paid to her quarterly, or half-yearly, as they might deem proper; and he appointed his Brothers, *George Winch* and *James Winch*, his Executors and residuary Legatees.

*Annuity.
Agreement.
Mistake.*

The Court cannot inquire into the adequacy or inadequacy of the consideration of a Compromise fairly and deliberately made.

Qu. Whether the Rule, that a Trustee cannot purchase from his *Cestui que Trust*, prevails where the relation of Trustee gives no advantage.

The Testator died soon after the date of his Will; and the Executors proved it in the Mayor's Court at *Madras Patnam*, where the Testator and the Plaintiff were resident at the time of making his Will, and of his Death.

By an Indenture dated the 8th of March 1798, made between the Executors of the one part, *Adrian* and *John De Fries* of the second part, and Mr. *Kindersley* and Mr. *Cockburn*, the Trustees for the Plaintiff under the Will, of the third part, after reciting the Will, and that Mr. *Kindersley* and Mr. *Cockburn* had declined accepting the Trusts of it for a longer period than the natural life of the Plaintiff, the Executors assigned to *A. and J. De Fries*, their Heirs, Executors and Administrators, the sum of 20,000 Star Pagodas, part of

1824.

NAYLOR
v.
WINCH.

the Testator's Estate, upon Trust to pay, out of the Interest and Produce of that Sum, the Annuity of 600 *l.* to Mr. *Kindersley* and Mr. *Cockburn*, their Heirs, Executors or Administrators, for the sole use and benefit of the Plaintiff during her life ; and, after her decease, to repay the principal Sum of 20,000 Star Pagodas to the Executors, who thereby bound themselves, their Heirs, Executors or Administrators, upon such repayment, to cause the said Annuity of 600 *l.* to be paid to such Issue of the body of the Plaintiff as should or might be lawfully begotten during the time of his, her or their natural lives, or the lives of the Survivor or Survivors, to each an equal Part or Share, with benefit of Survivorship, agreeable to the true meaning and intent of the Will, in such manner as they would have been bound to do if that Deed had not been made. It was also provided by this Deed, that if the Executors should find it advantageous to the Estate to remit the principal Sum of 20,000 Pagodas to *England*, and to place the same in the Public Funds, with such other and further Sum as might be sufficient to produce an Interest equal to the Annuity, it should be lawful to the Parties to enter into such other and further Agreement as might be requisite for that purpose.

The Plaintiff, as well as her Trustees and the Executors, were, at the time when this Deed was executed, resident in *India* ; and although she was not made a Party to the Deed, she was privy to it, approved of it, and acted under it.

In the year 1799, the Executors came to *England*, and proved the Will in the Prerogative Court of *Canterbury*. In 1808, the Plaintiff being then a Widow, intermarried with Mr. *H. Naylor*.

By the Settlement dated the 16th of December 1808, made in contemplation of this Marriage, the Plaintiff assigned to Mr. *Kindersley* and Mr. *Cockburn* and two other Gentlemen the Annuity of 600*l.* "given and bequeathed by the Will of the said *John Winch* to or in Trust for her and the Issue of her body," upon Trust to pay the same to the Plaintiff herself, for her life, for her separate use; and, after her decease, "upon the Trusts by the Will of the Testator directed and declared of and concerning the same."

1824.

NAYLOR
v.
WINCH.

In 1809, the Trustees under this Settlement filed a Bill in this Court against the Executors, the Plaintiff and her Husband, and a Child of the Marriage then born, for the purpose of compelling the Executors to vest in the *English* Funds as much money as would produce the Annuity of 600*l.*; and in this Bill it was suggested that the Plaintiff claimed to be entitled to the Annuity, not for her life only, but absolutely. In the Deed of 1798, and in the Marriage Settlement of 1808, it had been taken for granted that the Plaintiff was entitled for life only. The Executors had refused to make the investment required in the *English* Funds, inasmuch as it would occasion a great loss to them as the residuary Legatees of the Testator's Estate; and they also insisted upon a right to compel the Plaintiff to accept her Annuity from the 20,000 Star Pagodas in *India*, according to the Deed of 1798.

In March 1812, it was agreed between the Plaintiff, her Husband, the Trustees, and the surviving Executor, (the other Executor being then dead), that upon a proper investment being made in the Public Funds of *Great Britain* for answering the Annuity of 600*l.* the Suit instituted in 1809 should be terminated

1824.

NAYLOR
v.
WINCH.

and the Bill dismissed. Accordingly a Deed dated the 23d of March 1812, between the Plaintiff and her Husband of the first part, the Trustees of the Settlement of 1808 of the second part, and the surviving Executor of the third part, was prepared and duly executed by all Parties. This Deed, after reciting the various circumstances already mentioned, recited that "doubts were entertained respecting the true construction and effect of the Testator's Will in certain contingencies;" and that it had been agreed to invest a sufficient sum in the Funds of *Great Britain*, for the purpose of securing the Annuity upon all the Trusts declared concerning the same in the Will of the Testator, "except so far as the said Trusts are altered by virtue of these presents;" and also reciting that the Executor had accordingly invested the sum of 12,000*l.* Navy Five per Cent Annuities in the joint Names of himself and another Trustee named by him, and of Mr. *Kindersley* and Mr. *Cockburn*, witnessed that, for declaring the Trusts of the sum of 12,000*l.* Navy Five per Cent Annuities so invested, it was declared and agreed by all the Parties that the Trustees in whose names that sum was invested should stand possessed thereof in Trust to pay the Dividends thereof to the Plaintiff for life, for her sole and separate use, in satisfaction of the Annuity of 600*l.* and in lieu of all interest in the 20,000 Star Pagodas, and, after her decease, to stand possessed of the Capital Sum of 12,000*l.* Navy Five per Cent Annuities, upon the Trusts and for the intents and purposes created by the Testator concerning the Annuity of 600*l.* "except so far as the same Trusts were varied by the Assignment thereby made by the Plaintiff and her Husband of all their Interest, in any event, contingency or possibility in the Capital Sum of 12,000*l.* Five per Cent Annuities after the decease of the Plaintiff, whether such right or

1824.

NAYLOR
v.
WINCH.

interest should vest in the Plaintiff and her Husband in their own right, or as Representative of any of her Children, or by any other means whatsoever;" and it was thereby provided that, in case the Plaintiff's Husband should survive her, and the Executor should on her death become entitled, by virtue of the Testator's Will or otherwise, for his own use, to any part of the Capital Sum of 12,000 *l.* Navy Five per Cents, then that a sufficient part thereof should be conveyed to Trustees, in order that the Plaintiff's Husband should receive out of the Dividends an Annuity of 300 *l.* for his life; and the Plaintiff and her Husband accordingly assigned to the Executor, absolutely, all right and interest in the 12,000 *l.* Navy Five per Cents that might accrue to them in any event after the death of the Plaintiff, or in right of Representation to any of the Plaintiff's Children.

The Plaintiff's Husband died sometime before the present Bill was filed by her against the surviving Executor, the Trustees of the Settlement of 1808, the Trustees under the Deed of 1812, and the Children of the Plaintiff, praying to have it declared that she took an absolute interest in the Annuity of 600 *l.* under the Will of the Testator, and to have transferred to her the Capital Sum of 12,000 *l.* Navy Five per Cent annuities.

Mr. Horne and Mr. Kindersley, for the Plaintiff:—

I. Under the Will the Plaintiff must be held to be absolutely entitled to the Annuity; and, as the Deed of Compromise proceeded upon a mistake as to the nature of her interest in the Annuity, she cannot be bound by it. The interest which the Plaintiff took in the Annuity under the Will was an Estate in the nature of a Fee-

1824.

NAYLOR
v.
WINCH.

simple conditional at Common Law. *Turner v. Turner* (a). The only difference between the Bequest in that Case and the present, is that the Testator here uses the words "issue from her body." These words used in a Will of real Estate would give an Estate tail, or a Fee-simple conditional before the Statute *de Donis*; and, as an Annuity is not a species of Property within the operation of that Statute, the Plaintiff must be held to take this Annuity as a Fee-simple conditional. The nature of such an Annuity issuing out of the general personal Estate of a Testator is, according to the Expression of Lord *Loughborough* in *Turner v. Turner*, personal only as to its remedy, but real as to its descent. A real interest is created in personal Property by the gift of an Annuity with words of inheritance, just as a personal Interest is given out of real Estate by a term of years. The Interest which a Husband takes in an Annuity given to his Wife as a Fee conditional, is different from that which he takes in personal Estate given to his Wife. Therefore, where a Woman is entitled to a Fee-simple conditional in an Annuity, and she dies leaving a son, her Husband, though he survives, can not be entitled to any Interest in the Annuity. There are many Cases in which it has been held that, where Parties mistake their interests, the Court will relieve against a compromise entered into under the mistake. In the present Case it is plain that the Plaintiff was ignorant of the extent of the Interest which she had in this Annuity, and could not intend to give up a perpetuity in the Annuity, because she did not know that she was entitled to a perpetuity in it. By the Deed of 1798 the Parties took upon themselves to declare what were their Rights under the Will, and mistook the nature of

(a) 1 Bro. C. C. 323.

the Plaintiff's interest in the Annuity. Upon that mistake all the subsequent Deeds were founded, for they all proceed on the notion that the Plaintiff was entitled only to a life Interest in the Annuity.

1824.

NAYLOR
v.
WINCH.

II. The mistake in this Case is of such a nature as the Court will relieve against. It is not necessary that there should be Fraud or Concealment in order to obtain relief against Deeds entered into by Parties who mistook their Rights in the Property affected by them. The Doctrine of the Court, as established by many Cases, is that, if Parties enter into a Deed under a mistake as to their rights, this Court will relieve them and rescind the Deed. *Pooley v. Ray* (b); *Hitchcock v. Giddings* (c); *Farewell v. Coker* (d); *Turner v. Turner* (e); *Lansdowne v. Lansdowne* (f); *Bingham v. Bingham* (g); *Pusey v. Desbouverie* (h). The Deed of 1812 contains in itself sufficient evidence that the Plaintiff executed it under a mistake as to her Right. That Deed recites the Deed of 1798, which states the Plaintiff to have a life Interest in the Annuity. No passage in the Deed of 1812 contains any thing to show that any notion of the Plaintiff's Rights was then entertained different from that expressly stated in the Deed of 1798, excepting these words: "And whereas doubts being entertained respecting the true construction and effect of the Will of the said *John Winch* in certain contingencies." The words 'in certain contingencies' show that the doubts referred to some other possible Right which the Parties fancied might arise upon the construction

(b) 1 P. W. 355.

(c) 4 Price, 135.

(d) Cited by Sir *William Grant* in *Cholmondeley v. Clinton*, 2 Meriv. 353.

(e) 2 Cha. Rep. 81.

(f) *Moseley*, 364.

(g) 1 Ves. 126.

(h) 3 P. W. 315.

1844.

NAYLOR
v.
WINCH.

of the Will. It could not mean that the doubt was as to the extent of the Plaintiff's Right in certain contingencies, because her right did not depend upon any contingency. At that time she had two Children born, and her interest in the Annuity had become absolute.

III. The inadequacy of the consideration in the present Case is evidence that the Plaintiff did not know what the extent of her Rights was at the time when she executed the Deed of 1812.

IV. The Person who made the Compromise with the Plaintiff by the Deed of 1812, was the Executor, who was himself a Trustee for the Plaintiff who was at that time a married Woman, and was not therefore competent to enter into such an arrangement with her. It was his duty to protect her Interests under the Will in the Property which was given to her separate use.

V. Another Class of Cases which may be applied to the present is that in which the Court has held that, where general words have been used in a Deed which extend to include matters not within the contemplation of the Parties or the amount of the Consideration, the operation of the general words was to be restrained to the particular object expressed to be within the view of the Parties. *Ramsden v. Hylton* (i), is a Case very nearly approaching to the present; for the Court there held that, in a Deed executed between a Brother and Sister, a general Release was not binding as to Rights of which the Parties were ignorant at the time. The same Principle was acted on in *Cole v. Gibson* (k). In *Cann v. Cann* (l), Lord Macclesfield says, "If the Party

(i) 2 Ves. 304.

(k) 1 Ves. 506.

(l) 1 P. W. 727.

releasing is ignorant of his Right, or if his Right is concealed from him by the person to whom the Release is made, there will be good reasons for the setting aside of the Release." In *Gibbons v. Caunt* (m), Lord Alvanley said, "No man can doubt that this Court will never hold Parties acting upon their Rights (doubts arising as to those Rights,) to be bound, unless they act with full knowledge of all the doubts and difficulties that arise."

1824.

NAYLOR
v.
WINCH.

Mr. Wigram, for the Trustees.

Mr. Sugden and Mr. Collinson, for the Defendants,
the infant Children of the Plaintiff:—

I. It is by no means clear that the Plaintiff can be held, on the true construction of this Will, to take an absolute Interest in this Annuity. The words of the Will are very peculiar, and import that the Gift was to the Plaintiff for her life, and to her Issue, if she should leave any living at her death. The Question is, whether the word Issue here is to be taken as a word of Limitation or of Purchase. The words in *Knight v. Ellis* (n) are nearly the same as in this Will; and there it was held that 'Issue' was a word of purchase. The Case of *Warman v. Seaman* (o), as stated by Mr. Fearne (p), is almost exactly this Case; for he says that a Devise of a Term to A. for life, and afterwards to his Issue, does not enlarge the Estate to A. But on referring to the Report of the Case it does not exactly bear out that statement.

II. If, however, the Plaintiff is to be considered as the absolute Owner of this Annuity under the Will,

(m) 4 Ves. 849.

(n) 2 Bro. C. C. 569.

(o) 2 Cha. Ca. 208.

(p) Fearne, Cont. Rem. 6 edit. 495.

1824.

NAYLOR
v.
WINCH.

the Deed of 1812 has bound all her Interest in it; and then the Deed declares that the Trustees are to stand possessed of the 12,000 *l.* Five per Cents, after the Plaintiff's death, for the benefit of the persons entitled under the Will.

Mr. *Heald* and Mr. *Simpkinson* for the Defendant
Winch, the Executor :

The Doubts which existed as to the extent and nature of the Interest which the Plaintiff took in the Annuity under the Will, formed an adequate consideration for the compromise which was effected by the Deed of 1812. No case of Fraud is made out by the Plaintiff; and there was no Mistake to enable the Court to say that the Deed of 1812 ought to be set aside. That Deed was settled under the best legal advice on behalf of all Parties: there was nothing like surprise; and the rights of all the Parties to that Deed must be held to be bound by it. If, as was contended on behalf of the Children, the Plaintiff took only a Life Estate, then it is plain that the Executor was a very considerable loser on this compromise, which proceeded upon the notion that the Plaintiff had something more than a mere Life Estate in the Annuity. The construction of the Will admitted of doubt; that doubt was a sufficient consideration for the compromise, and the Deed of Compromise is unimpeachable.

The VICE-CHANCELLOR, [after stating the Facts of the Case:]—

If a Party, acting in ignorance of a plain and settled principle of Law, is induced to give up a portion of his indisputable Property to another under the name of Compromise, a Court of Equity will relieve him from the effect of his mistake. But where a doubtful

Question arises, such as this Question of Construction upon the Will of the Testator, it is extremely reasonable that Parties should terminate their differences by dividing the stake between them, in the proportions which may be agreed upon. In this Bill it is generally alleged that the Plaintiff was fraudulently drawn into this Deed. But that Allegation is totally unsupported by Evidence; and on the contrary it is proved, by the Defendant the Executor, that the transaction of the Compromise proceeded upon great deliberation on the part of the Plaintiff, her Husband, and her Trustees; and that the Deed was settled on behalf of all Parties, by one of the most respectable names in the profession, the late Mr. *Shadwell*.

1824.

NAYLOR
v.
WINCH.

It is said that there was either no Consideration passing to the Plaintiff, or a Consideration grossly inadequate. That there was a Consideration is quite clear—the investment of the 12,000 *l.* Navy Five per Cents in lieu of the 20,000 Pagodas, and the payment of the Costs of the Suit in 1809, and the Covenant for securing the 300 *l.* a year to the Husband for his Life, if he should survive the Plaintiff, out of any Interest which the Executor might acquire in the capital Sum or Stock, either by the Assignment of the Plaintiff and her Husband, or otherwise howsoever.

Where a Compromise of a doubtful Claim is entered into fairly, and with due deliberation and upon consideration, a Court of Justice cannot inquire into the supposed adequacy or inadequacy of the Consideration. Where is it to find a scale for determining the true measure of adequacy? If a Court is in such a case to be governed by its judicial opinion upon the rights of the Parties, then, to him who by that opinion is held

Where a Compromise of a doubtful Claim is entered into fairly, with due deliberation, and upon consideration, the Court will not inquire into the adequacy of the Consideration.

1824.

NAYLOR
v.
WINCH.

to be entitled to the whole Property, no Consideration can be really adequate which is less than the whole, and no Compromise can ever bind the successful Claimant. It is for this reason, and because I consider it to be wholly immaterial for the purpose of deciding upon the validity of the Deed of Compromise, that I do not give any opinion upon the arguments by which the Counsel for the Plaintiff assert her Claim to the perpetual Annuity. It is enough to support this Deed, that there was a doubtful Question and a Compromise fairly and deliberately made upon consideration; and the actual Rights of the Parties, whatever they might be, cannot affect the question.

It is said, in respect of the nature of the Property and of the situation of the Plaintiff as a married Woman, that this Deed will not have the beneficial effect in favour of the Executor which was intended by it. But assuming this to be so for the sake of argument, does it form any reason why, at the request of the Plaintiff, the Deed is to be declared void? If the Plaintiff, by reason of some incapacity on the part of the Executor, had not the full benefit for which she contracted, she might with reason challenge the Deed. But if the Defendant is willing to stand by the Deed as it is, can she take from him what it may actually give him, because the bargain is less beneficial to him than she intended it.

It is next contended that the Executor was a Trustee for the Plaintiff, and incapable therefore, upon principles of general policy, of dealing with his *Cestui que Trust*, in respect of the Trust Property. An Executor is in an artificial sense a Trustee for every Legatee until the Legacy is paid or invested. But it is at least doubt-

1824.

NAYLOR
v.
WINCH.

ful whether, under the circumstances of this Case, the Trust, in that artificial sense, was not determined. The material dispute between the Parties was whether the investment of the 20,000 Pagodas was not, as to the Plaintiff and her actual Trustees, a satisfaction of the Annuity; and this, not in respect of the state of the Assets of the Testator, (for there the Executor might be considered a Trustee), but in respect of the Contract of the Plaintiff and her Trustees which the Executor insisted gave to him a personal benefit as residuary Legatee.

Where the policy of this Court prevents a Trustee from dealing with his *Cestuique* Trust, it is upon the principle that his situation as Trustee gives him an advantage in such dealing. If this Executor could in any sense be called a Trustee, yet, inasmuch as here was no question of Assets, and as the dealing proceeded entirely upon his character of residuary Legatee, it is impossible that he could derive any advantage in dealing with the Plaintiff and her Trustees from his character of Executor.

Bill dismissed, with Costs.

The *Vice Chancellor* said that his reason for giving the Defendant Costs was that the Plaintiff did not seek to avoid this Compromise until after the death of her Husband, whereby one of the Considerations to the Plaintiff had failed.

1824.
29th January.

HONY v. HONY.

*Waste. Statute
of Limitations.*

If a Tenant for Life has rendered Accounts to the Remainder-man of Timber cut by him during a period of more than six years before a Bill is filed against him for an Account of such Timber and of the value of it, the Statute of Limitations cannot be pleaded to the Bill; for though, if the Remainder-man had brought an Action of Trover, the Tenant for Life might, notwithstanding the rendering of the Accounts, have pleaded the Statute, he could not have done so if the Remainder-man had brought an Action of Assumpsit.

THE Bill stated that the Reverend *John Hony*, the late Grandfather of the Plaintiff, by his Will, after giving certain parts of his real Estates to his Son *William Hony*, since deceased, the Plaintiff's late Father, for life, and to his Issue in strict settlement, gave all his other Lands and Tenements and Hereditaments to certain Persons therein named, in Fee-simple, to the use of his Son, the Defendant *John Hony*, and his Assigns, for his natural life; with Remainder to Trustees to preserve contingent Remainders; with Remainder to his first and other Sons in Tail; with Remainder to the use of *William Hony* and his Assigns, for his natural life; with Remainder to Trustees to preserve contingent Remainders; with Remainder to his first and other Sons in Tail: that the Testator left him surviving his Sons *William Hony* and *John Hony*: that the Testator died in or about the year 1767: that, at the death of the Testator, *John Hony* was an Infant of the age of sixteen years, or thereabouts: that, upon the death of the Testator, some Person, on behalf of *John Hony*, entered into the Possession or Receipt of the Rents and Profits of the Hereditaments and Premises devised to him for his life; and that, upon his attaining the age of twenty-one years, which he did in the year 1772, he, in his right, entered into the Possession and into the Receipt of the Rents and Profits of the Premises so devised to him for his life: that *John Hony* was a Bachelor: that *William Hony*, the Plaintiff's Father, died in 1795, leaving the Plaintiff his eldest Son and Heir at Law: that, in manner aforesaid, subject to the Life Estate of *John Hony*, the Plaintiff was Tenant in

Tail general of the Premises devised to *John Hony* for his life, and would as such, upon the death of *John Hony*, be entitled to the Possession thereof, in case *John Hony* should die without leaving any Child: That, at the time of the death of the Testator, or prior to the year 1794, there were divers large Timber and Timber-like and other Trees growing upon the Premises devised to *John Hony* for his life, and which were of considerable value: that *John Hony*, notwithstanding he was Tenant for life only of the same Premises, prior to the year 1794, caused divers large quantities of such Timber and Timber-like and other Trees to be cut down and sold, and received the Money arising from such Sale, and applied the same to his own use: that, in and since the year 1794, *John Hony* had cut down and sold divers other large quantities of such Timber and Timber-like and other Trees growing upon the same Premises, and had applied the Money arising from such Sale to his own use: that the Plaintiff had only lately discovered that *John Hony* had done so, and that he was not entitled so to do; and, soon after the Plaintiff had made such Discovery, he caused applications to be made to *John Hony*, that he would render to him an Account of the number of Timber and Timber-like and other Trees which he the said *John Hony* had cut or caused to be cut down from the Premises devised to him for life, and for the value thereof and Interest on the value thereof, and that the same should be laid out and accumulated, to be paid to the Plaintiff in case *John Hony* should die without leaving any Issue; but *John Hony* had refused to do so; and although he had rendered some Account of the Sums produced by the Sale of the Timber so cut or caused to be cut down by him, making the same amount, from

1824.

HONY
v.
HONY.

1824.

HONY
v.
HONY.

the year 1794 to the year 1821, both inclusive, to 1,601 *l.* 4 *s.* 4 *d.* yet the Plaintiff charged that such Account was very inaccurate, and that the Timber and Timber-like and other Trees which were cut or caused to be cut down by *John Hony* from the Premises, between the year 1794 to 1821, both inclusive, were of much greater value, and were sold by him for Sums exceeding 1,601 *l.* 4 *s.* 4 *d.*; and, as Evidence thereof, the Plaintiff charged that he had lately caused inquiries to be made of the sums of Money for which *John Hony*, in and since the year 1794, had sold and disposed of the Timber and Timber-like and other Trees cut down by him as before mentioned; in answer to which inquiries the Plaintiff received certain Accounts, and from which Accounts, and the Accounts furnished to the Plaintiff by *John Hony* as aforesaid, it appeared, so far as the same Accounts extended, and as the Plaintiff charged the fact to be, that, in and since the year 1794, and down to the year 1821, the Timber and Timber-like and other Trees cut or caused to be cut by *John Hony* from the Premises in each year in which it appeared by such Accounts that Timber was cut, were sold by or for *John Hony* for the Sums following; (that is to say), in 1794, the Sum of 512 *l.* 10 *s.*; in 1804, the Sum of 10 *l.*; in 1806, the Sum of 10 *l.* 10 *s.*; in 1807, the Sum of 916 *l.*; in 1808, the Sum of 18 *l.* 5 *s.*; in 1809, the Sum of 160 *l.*; in 1812, the Sum of 545 *l.*; in 1813, the Sum of 268 *l.*; in 1814, the Sum of 528 *l.*; in 1815, the Sum of 150 *l.*; in 1818, the Sum of 9 *l.* 18 *s.* 4 *d.*; in 1821, the Sum of 126 *l.* 3 *s.*; which several Sums amounted to the Sum of 3,254 *l.* 6 *s.* 4 *d.* The Plaintiff further charged that, in addition to the Sums mentioned in these Accounts, *John Hony*, in and since the year 1794, had cut or caused to be cut down

1824.

HONY
v.
HONY.

divers other large quantities of Timber and Timber-like and other Trees from the Premises devised to him for life; and that so it would appear, if *John Hony* would set forth a full and particular Account of all the Timber and Timber-like and other Trees which, in each year in and since the year 1794, he had cut or caused to be cut from the Premises; and to whom and for what Sums the same were sold: that there were then growing, upon the Premises devised to *John Hony* for his life, divers large Timber and Timber-like and other Trees, which he threatened to cut down.

The Bill then charged, in the usual manner, that *John Hony* had, since the year 1794, kept Accounts of the Timber and Timber-like and other Trees cut down by him from the Premises, and the Prices for which the same were sold, and that he had such Accounts in his possession or power, as also divers other Papers relating to the matters in the Bill mentioned, and that he ought to set forth a List or Schedule thereof.

The Bill prayed that an Account might be taken of all Timber and Timber-like and other Trees which in and since the year 1794 had been cut or caused to be cut down by the Defendant from the Premises devised to him for life and of the value thereof in each year; and that the Defendant might be decreed to pay what should be so found to be the value thereof, together with Interest thereon, from the time at which he received or might have received such value; that the Sums which should be so found due from the Defendant might be laid out in the name of the Accountant General in trust in the Cause, and accumulated for the benefit of the Person or Persons who might be entitled thereto upon the death of the Defendant;

1824.

HONY

v.

HONY.

that, in case the Defendant should not leave any Child living at his death, such Sums, together with the Accumulations thereon, might be decreed to be paid to the Plaintiff; and that, in the meantime, the Defendant might be restrained from cutting down, lopping or injuring any Timber and Timber-like and other Trees growing upon the Premises.

To this Bill the Defendant put in a Plea and Answer. The Plea was as follows :—

“ This Defendant not confessing, &c. as to so much of the said Bill as seeks that this Defendant should discover and set forth whether this Defendant did not, prior to the year 1794, cause divers large quantities of Timber and Timber-like and other Trees, growing in and upon the Hereditaments and Premises devised by the Testator in the said Bill named, to this Defendant for his life, as in the said Bill mentioned, to be cut down and sold from and off the said Hereditaments and Premises; and whether this Defendant did not receive the Money arising from such Sale; and whether in and since the year 1794, and more than six years before the filing of the said Bill of Complaint, this Defendant had not cut or caused to be cut down divers other large or some quantity of such Timber and Timber-like and other Trees growing upon the said Hereditaments and Premises; and whether he had not sold the same, and received the Monies arising from such Sale; and whether he had not applied such Monies to his own use; and whether so much of the Account in the said Bill mentioned to have been rendered by this Defendant to the said Plaintiff, as related to Timber and Timber-like and other Trees growing upon the said Hereditaments and Premises, cut by Defendant more than six years prior to the filing of the said Bill, was not very or in some degree inaccurate;

and whether the Timber and Timber-like and other Trees in the Bill alleged to have been cut or caused to be cut down by this Defendant, from and off the Hereditaments and Premises, between the years 1794 and 1821, and more than six years prior to the filing of the Bill, were not of much greater value, and were not sold by this Defendant for sums exceeding, and how much, the sum of 1,601*l.* 4*s.* 4*d.* in the Bill mentioned; and whether the Timber and Timber-like and other Trees by the Bill alleged to have been cut or caused to be cut by this Defendant, from and off the Hereditaments and Premises, in the several years following, were not sold by or for this Defendant for the Sums respectively following; that is to say, in 1794, for the sum of 512 *l.* 10*s.*; in 1804, for the sum of 10 *l.*; in 1806, for the sum of 10 *l.* 10*s.*; in 1807, for the sum of 916 *l.*; in 1808, for the sum of 18 *l.* 5*s.*; in 1809, for the sum of 160 *l.*; in 1812, for the sum of 545 *l.*; in 1813, for the sum of 268 *l.*; in 1814, for the sum of 528 *l.*; in 1815, for the sum of 150 *l.*; or for any other and what sums; and whether, in addition to the Sums in the said Account mentioned, this Defendant had not, in and since the said year 1794, and more than six years prior to the filing of the said Bill, caused to be cut down divers other large or some quantities of Timber and Timber-like and other Trees from and off the said Hereditaments and Premises so devised to him for life as aforesaid; and also as to so much of the said Bill as seeks that this Defendant may set forth a full and particular Account of all the Timber and Timber-like and other Trees which in each year in and since the year 1794, and more than six years prior to filing of the said Bill, this Defendant has cut or caused to be cut from and off the said Hereditaments and Premises, and when

1824.

HONY
v.
HONY.

1824.

HONY
v.
HONY.

and to whom the same was or were sold, and for what sums of Money ; and whether this Defendant had not since the year 1794, and more than six years prior to the filing of the Bill, kept Books of Account or Memorandums in which he had made Entries of the quantity of Timber and Timber-like and other Trees cut by him from and off the said Hereditaments and Premises more than six years prior to the filing of the said Bill, the time when such Timber and Timber-like and other Trees were cut, the Names of the Persons to whom, and the Sums for which the same was or were sold, or containing some and which of such Particulars ; and whether this Defendant hath not or had not, and when last, in his possession or power such or the like Books of Account and Memorandums, and whether or not also divers other Papers, Writings, Documents and Letters, or Copies of Letters, relating to the Matters aforesaid, or some of them, more than six years before the filing of the said Bill ; and also to so much of the said Bill as seeks that this Defendant may set forth a List or Schedule thereof, and produce and leave the same in the hands of his Clerk in Court for the usual purposes ; and may set forth what is become of such of the aforesaid particulars, if any, as were or was but which are not or is not now in his possession or power ; and also to so much of the said Bill as seeks that an Account may be taken, under the direction of this Court, of all Timber and Timber-like and other Trees which in and since the year 1794, and more than six years prior to the filing of the said Bill, have been cut or caused to be cut down by this Defendant from and off the said Hereditaments and Premises so devised to him for life as aforesaid, and of the value thereof in each year ; and that this Defendant may be decreed to pay what shall

1824.

HONY
v.
HONY.

be so found to be the value of such Timber and Timber-like and other Trees so cut or caused to be cut by him as aforesaid, together with Interest thereon from the time at which he received or might have received such Value; and that the Sums which shall be so found due from this Defendant may be laid out in the name of the Accountant-General of this Court, in Trust in this Cause, and accumulate for the benefit of the Person or Persons that may be entitled thereto upon the death of this Defendant; and that, in case this Defendant should not have any Child living at his death, then that such Sums, together with the Accumulations thereon, may be decreed to be paid to the said Complainant; this Defendant doth plead in bar, and for plea saith that, by a Statute made and passed in the 21st year of the reign of his late Majesty King *James the First*, intituled: "An Act for Limitation of Actions, and for avoiding of Suits at Law," it is enacted, that all Actions of Trespass *quare clausum fregit*, all Actions of Trespass, Action *sur Trover* and *Replevin* for taking away of Goods and Cattle, all Actions of Account and upon the Case, other than such Accounts as concern the Trade and Merchandize between Merchant and Merchant, their Factors and Servants, and all Actions of Debt grounded upon any Lending or Contract without specialty, which shall be sued and brought at any time after the end of this present Session of Parliament, shall be commenced and sued within three years after the end of this present Session of Parliament, or within six years next after the cause of such Actions or Suit, and not after. And this Defendant doth aver that the said Bill was filed in this honourable Court on or about the 1st day of *February* last. All which matters and things this Defendant doth aver

1824.

HONY

v.

HONY.

and plead to so much of the said Plaintiff's Bill as hereinbefore particularly mentioned; and prays, &c."

The Answer admitted that the Testator made his Will and died as stated in the Bill, and that he left him surviving his Sons, the Defendant and *William Hony*: That at the death of the Testator the Defendant was an Infant of the age of sixteen years or thereabouts: That, on the death of the Testator, his Widow, on behalf of the Defendant, entered into possession or into the receipt of the Rents and Profits of the Premises devised to the Defendant for his life, and managed the same until the Defendant attained his age of 21 years, in the year 1772, when the Defendant entered into the possession thereof or into the receipt of the Rents and Profits thereof: That the Defendant was a Bachelor: That *William Hony* attained the age of 21 years in the year 1775, and died about January 1795, and left him surviving the Plaintiff, his eldest Son, and Heir at Law. But the Defendant did not admit that the Plaintiff was the Heir at Law of *William Hony*. The Answer also admitted that, subject to the Defendant's Life-interest, the Plaintiff was Tenant in Tail General of the Premises devised to the Defendant for his life, and would, upon the Defendant's death, as such, be entitled to the Possession thereof in case the Defendant should die without Issue: That there were divers large Timber and Timber-like and other Trees growing upon the Premises devised to the Defendant for his life, and that such Timber and Timber-like and other Trees were of considerable value: That since the year 1794, and within six years prior to the filing of the Bill, the Defendant had cut or caused to be cut down some Timber and

1824.

HONY
v.
HONY.

Timber-like and other Trees growing upon the Premises, and had sold the same and received the Money arising from such Sale, and had applied such Monies to his own use : That at the time when he so cut and sold the Trees, and until he was advised to the contrary, shortly before the filing of the Bill, he verily believed he was legally entitled so to do. The Answer denied that the Plaintiff had lately discovered that the Defendant had lately cut and sold Trees growing on the Premises, for that the same were not clandestinely cut or sold, and the Defendant believed that the Plaintiff was apprised thereof at or shortly after the time of the Sales : That some time in or about the early part of the year 1822 the Plaintiff's Solicitor addressed several Letters to the Defendant's Solicitor requiring an Account of the Timber cut by the Defendant from the Premises : That in or about the month of May 1822 the Defendant caused to be sent to the Plaintiff's Solicitor a Statement of the Sums received by the Defendant for Sales of Timber and Timber-like and other Trees cut from the Premises in and since the year 1794 to the year 1821 inclusive, amounting in the whole to the Sum of 1,601 *l.* 4 *s.* 4 *d.* : That at the time when this Statement was prepared and delivered the Defendant believed the same to be accurate, but that he was then in a state of dangerous indisposition, and was thereby prevented examining the Books in which Entries of the Sales were made with a due degree of attention, and the Defendant now believed that the Statement was inaccurate, and that the Timber and Timber-like and other Trees cut from the Premises by the Defendant within six years prior to the filing of the Bill were of greater value than they by the Statement were represented to be, and were sold by the Defendant for Sums exceeding those specified in the Statement.

1824.

HONY
v.
HONY.

The Defendant in a Schedule to his Answer set forth Accounts of the Timber and Timber-like and other Trees which he had cut or caused to be cut from the Premises, and of the Monies he had received from the Sale thereof.

Mr. *Heald* and Mr. *Swanston*, in support of the Plea :—

The question is, whether a person having a Life Interest only, and having cut Timber on the Estate, can be called upon to account in a Court of Equity for a greater period than six years.

This is not a Case of Equitable Waste: In that case the Court might extend the Account to a period of twenty years; because Equitable Waste is a breach of Trust reposed by the Testator in the Tenant for life. We admit that the Action of Waste is not within any Statute of Limitations. But no proceeding in Equity can be analogous to a Penal Action, or in aid of it. The Accounts rendered would not prevent the operation of the Statute on an Action of Trover. The cause of Action, namely, the Tort, must be within six years. Subsequent acknowledgments of prior Torts are nugatory. In Actions of Assumpsit these Acknowledgments are themselves causes of Action as new Assumpsits.

The Plaintiff seeks an equitable Remedy for a legal Right. Since he became Tenant in tail immediately expectant on the Defendant's Estate for life, he might at all times have recovered Damages for Waste in an Action of Trover, notwithstanding the possibility of prior Estates of Inheritance. *Udal v. Udal (a)*; *Skelton*

1824.

HONY
v.
HONY.

v. Skelton (b); *Whitfield v. Bewit* (c); *Bewick v. Whitfield* (d). Upon what foundation have Courts of Equity assumed jurisdiction to give the remedy of Account for merely legal Waste? Interposing their peculiar preventive process of Injunction, they proceed to take the Account on the single principle of preventing multiplicity of Suits. *Jesus College v. Bloom* (e); *Smith v. Cook* (f). Why is the Plaintiff to come into this Court to pray an Injunction, and thereby get an Account more extensive than he could have had at Law? If he had resorted to a Court of Law he must have brought an Action of Trover, and then the Account would have been confined to six years. For the Statute of Limitations is a good Plea to an Action of Trover. The Account must, therefore, be commensurate with the relief given at Law in the Action of Trover, and the Plea of the Statute of Limitations must be a good bar to a Bill for an Account of Waste. To give extended Relief would be to proceed on some other principle than the mere policy of preventing circuity of Action.

Even if Courts of Equity entertained a Bill for an Account of legal Waste as the subject of distinct substantive jurisdiction, they must be confined within the same limits as Courts of Law. The Plaintiff's Claim is merely legal. He suggests no Equity to entitle him to any peculiar Relief in this Court. In a much stronger case a Plea of the Statute has been allowed. *Lockey v. Lockey* (g). A Court of Equity could not, on the same facts, at once refuse an Injunction and direct an Account. That would be to abandon its own peculiar

(b) 2 Swann. 170, n.

(c) 2 P. W. 240.

(d) 3 P. W. 266.

(e) 3 Atk. 262.

(f) 3 Atk. 381; see also 6 Ves. 89; and 9 Ves. 346.

(g) Prec. Ch. 518.

1824.

HONY
v.
HONY.

Jurisdiction, while it invaded the province of Courts of Law. No Injunction would be granted on acts of Waste committed more than six years before the filing of the Bill. *Barry v. Barry* (h). With what consistency then can an Account be directed of those acts of Waste?

Mr. Hart and Mr. Koe, for the Plaintiff, said that the Owner of the Inheritance had three remedies for Waste committed by the Tenant for life; that he might either bring an Action of Waste, of Trover, or for Money had and received where the Timber had been sold; and that, in the last of those Actions, a new cause of Action arose whenever an Account of the Timber cut and sold was rendered to the Remainderman; and that therefore the Account rendered in this case prevented the Statute of Limitations from being a good bar to the Relief prayed by the Bill.

The VICE-CHANCELLOR:—

It is clear upon the Authorities that the Plaintiff might have elected to bring an Action of Assumpsit, and not Trover, for the Monies had and received by the Defendant from the Sale of Timber, and that the rendering of the Account, as alleged by the Bill, would have been an acknowledgment by the Defendant, which, in the Action of Assumpsit, would have taken the Case out of the Statute of Limitations. The Plaintiff does not in this Bill impeach the Sale of Timber as improperly or improvidently made by the Defendant; and, though he prays an Account of the Value, it would be quite consistent with the Case made by the Bill that he should seek a Decree for an Account of the Produce

(h) 1 J. & W. 651.

of the Sales as truly representing the Value. I consider the Bill here, therefore, as analogous to the Action of Assumpsit, and that the alleged render of the Account defeats the Plea of the Statute of Limitations.

1824.
HONY.
v.
HONY.

Plea overruled.

WILLIAMS v. PRICE.

1824.
9th February.

BY an Indenture dated the 4th of February 1817, and made between *Walter Price* of the one part and *John Price* of the other part, after reciting that *Walter Price*, in Hilary Term 1816, obtained a Judgment in the Court of King's Bench against *James Price*, in an Action of Debt upon a Bond for 1,600*l.*, and that there was then due to *Walter Price*, for Principal and Interest upon the Judgment, the sum of 520*l.*, and that *Walter Price* was indebted to *John Price* in the sum of 520*l.*, and, in order to secure to him the due payment thereof with Interest, had proposed and agreed to assign the Judgment, and all Monies due and owing to him by virtue thereof, to *John Price* in manner therein mentioned, *Walter Price* assigned to *John Price* the Judgment and all Money then due and to become due thereon, subject to a proviso that, if *Walter Price*, his Executors, Administrators or Assigns, should pay to *John Price* the sum of 520*l.* with Interest for the same at 5*l.* per cent, on the 4th of February 1818 then next, the Indenture should become void: and *Walter Price* thereby covenanted with *John Price* that he, his Heirs, Executors or Administrators would pay to *John Price* the 520*l.* and Interest at the time before mentioned.

Debtor
and Creditor.

Where a Creditor takes from his Debtor an Assignment of a Debt due from a third Person as a Security for his demand, and, by his wilful default, the Debt becomes irrecoverable, he must bear the loss.

1824.

WILLIAMS
v.
PRICE.

In October 1818 *Walter Price* died, having appointed the Plaintiffs his Executors. In June 1818, the Defendant sued out Execution on the Judgment against *James Price*, but, in consequence of his Attorney being then otherwise engaged, the Execution was not put into the Sheriff's hands; and, in August following, *James Price* paid to *John Price* 300 *l.* in part payment of the 520 *l.* and promised to pay the Balance; upon which the Defendant refrained from putting the Execution into the Sheriff's hands. No further payment being made on account of the Debt, *John Price*, after many ineffectual applications had been made by him to *James Price*, caused another Execution to be issued against him in April 1819 for the residue of the Debt; but that Execution having been issued in the name of *Walter Price*, no levy was made under it, because *Walter Price* was then dead. Some correspondence afterwards took place between *John* and *James Price*, and the latter having requested the former to give him further time for payment of the Money due, and promised that it should be shortly paid out of the Purchase Money of an Estate which he had contracted to sell, *John Price* agreed to give *James Price* further time for the payment of the Debt. In Trinity Term 1819, the remainder of the Debt being still unpaid, *John Price* caused the Judgment to be revived, and sued out Execution; but, when it was sent down to be levied, he discovered that the Effects of *James Price* were then in Possession of the Sheriff under Executions at the Suit of two other Creditors, so that no levy was made under it. In November 1819 and January 1820, *James Price* then sent *John Price* two Bills of Exchange, one for 50 *l.* and the other for 35 *l.*, in further discharge of the Debt. But these Bills were both protested. *John Price* commenced an Action against the Plaintiffs, the Executors

of *Walter Price*, upon the Covenant contained in the Indenture of Assignment, to recover the remainder of the Debt. Upon which the Plaintiffs commenced this Suit. The Bill after stating that *John Price*, in consideration of the 300 *l.*, agreed, without the authority or knowledge of the Plaintiffs, to allow *James Price* further time for payment of the residue of the Debt, prayed that he might be perpetually restrained from proceeding in the Action.

1894.
WILLIAMS
v.
PRICE.

The Cause now came on to be heard.

Mr. *Sugden* and Mr. *Knight* for the Plaintiff:—

In a Case like the present, where a Debtor assigns to his Creditor a Debt due to him from a third person, it is not necessary, in order to discharge the Assignor, to prove such a giving of time by the Assignee to the Debtor as is required for the purpose of discharging a Surety in a Suit between him and the Creditor. There it is necessary to show that the Creditor has actually tied himself up from suing. Here it is only necessary to prove a general course of forbearance on the part of the Assignee, during which the circumstances of the Debtor have been failing, and the Debt is ultimately lost. It appears, from the facts stated in the Pleadings, that such was the conduct of the Defendant in this Case. Had he used due diligence it is quite clear that he might have received the whole of his Debt. But he forbore to enforce payment until the Defendant had become insolvent, and therefore must suffer from the effects of his own neglect. The Case of *ex parte Mure* (a) is precisely in point, and completely decides this Case. It appears from the Correspondence that *James Price*

(a) 2 Cox, 63.

1824.
WILLIAMS
v.
PRICE.

sent the Defendant two Bills of Exchange for part of the Money remaining due from him, and that those Bills were presented and protested. Now, in all Cases between Principal and Surety, the giving of a Bill of Exchange for any part of the Debt is considered as a giving of time (*b*). Relying, therefore, upon the authority of *ex parte Mure*, we submit that, under all the circumstances of this Case, the Plaintiffs are discharged from all liability under the Covenant.

Mr. *Heald* and Mr. *Simpkinson*, for the Defendant :

This is not a Case in which a Surety claims to be discharged on account of time having been given by the Creditor to the principal Debtor. But here the principal Debtor says that he is discharged because the Creditor gave time to the Surety. This is a new Case. The Case of *ex parte Mure* does not apply ; for there the Debt due to Sir *B. Turner* from the *Woodbridges* exceeded the Debt assigned by them to him ; and the Assignment in that Case was an absolute Assignment, in part Payment of the Debt. Here the Assignment is made subject to Redemption, and as a collateral Security only. Lord *Thurlow*, C. in his Judgment in that Case, takes the distinction between an absolute Assignment and an Assignment by way of Security only.

Besides the Assignment, this Deed contains an independent Covenant on the part of *Walter Price* to pay the 520 *l.* to the Defendant. Consequently this Defendant has two Securities for his Money. It is quite clear that he might have resorted to both or either of the remedies that the Deed gave him. It is

(*b*) *Samuell v. Howarth*, 3 Mer. 272.

1824.

WILLIAMS
v.
PRICE.

alleged by the Bill that this Defendant sued out Execution on the Judgment against *James Price*, that he took Payment of 300 l. from *James Price*, and then agreed to defer enforcing payment of the remainder for an indefinite time. Supposing this representation to be correct, he was not prevented from suing out Execution the next moment. It was a mere *nudum pactum* for forbearance. The *Lord Chancellor* in delivering his Judgment in *Wright v. Simpson* (c), says, "As to the Case of Principal and Surety, in general Cases I never understood that, as between the Obligee and the Surety, there was an obligation of active diligence against the Principal. If the Obligee begins to sue the Principal, and afterwards gives time, there the Surety has the benefit of it." There is a similar Decision in the Court of King's Bench, *The Trent Navigation Company v. Harley* (d). There there was a laches of eight or nine years, and yet the Court held that the Surety was not discharged. In this Case time was not given by the Creditor to the principal Debtor: for *James Price* was the Surety. And it has been decided that dealing with the Surety will not discharge the principal Debtor. *Ex parte Gifford* (e). Here the Defendant had two concurrent Remedies; and whilst dealing with *James Price* he might have brought an Action on the Covenant against *Walter*. The Case therefore is, as we conceive, simply a case of forbearance. For as to the Bills of Exchange that have been alluded to, nothing is put in Issue respecting them. It does not appear that they were given in consideration of the Debt; but if they were, that could not vary the Rights of the Parties. For

(c) 6 Ves. 734.

(d) 10 East, 34.

(e) 6 Ves. 805.

1824.

WILLIAMS

v.

PRICE.

these reasons we submit that the Plaintiff has not made such a Case as entitles him to the Relief sought by his Bill.

Mr. Knight, in reply :—

The Equity on which this Bill proceeds is one relating solely to the circumstances in which the Parties stand. If an Assignee of a Debt will, without consulting the Assignor, deal with a Debtor as his own, and will continue giving him indulgence from time to time when he is in declining circumstances, assuming, in the most unequivocal manner, and adopting the Debt as his own by issuing three Executions for the recovery of it, is he not to be answerable to the Person who pledged the Debt? It is not necessary, even in the case of Principal and Surety, to show that the time was given for a limited period, and therefore it cannot be necessary in the present Case. With respect to the observations which have been made upon the Bills of Exchange, this Bill contains the usual charge that the Defendant has in his possession Papers relating to the matters in question. He leaves these Bills in the hands of his Clerk in Court, and therefore it is impossible for him to say that they do not relate to the matters in dispute. These Bills too are referred to in the Correspondence, and they were given for certain periods as purchases of the Plaintiff's forbearance. It is impossible to distinguish this Case from *ex parte Mure*. A Security is only a Security whatever may be its form. Whether a Proviso for Redemption is or is not introduced is of no consequence. It appears from the recitals of the Deed in *ex parte Mure* that the Assignment was intended to be a Security. It was an absolute Assignment indeed, but it was made as a Security only. If *ex parte Mure* is to be supported, it is impos-

sible to distinguish this Case from it, except that our Case is much stronger in favor of the Assignor. The Case of *ex parte Gifford* has no application, for it was a Case between Co-Sureties.

1824.
—
WILLIAMS
v.
PRICE.

The VICE-CHANCELLOR:—

The question here is, what is the degree of diligence which a Creditor accepting from his Debtor, by way of collateral Security, the Assignment of a Judgment recovered by that Debtor against a Stranger, is bound to use for the purpose of enforcing satisfaction of that Judgment. It is not necessary to determine whether such a Creditor is bound, at all events, to use legal diligence to give effect to the Judgment, or whether he may remain passive until required by the Assignor to resort to legal diligence. Here the Creditor, by suing out Execution, assumed, as it were, the possession or control of this Judgment in exclusion of the Assignor, and is within the principle which charges the Creditor in possession of Property held by him as a Security, not only with what he actually receives, but with what he might have received but for his wilful default or neglect. I think it would be difficult to find a principle for charging such a Creditor simply upon the ground that he gave time to the Debtor upon the Judgment; for it may be that the giving of time is a provident act, and affords the best chance of recovering the Debt. In referring it to the *Master* to take an Account of what the Defendant has received, or might have received without his wilful default or neglect, in respect of the Judgment Debt assigned to him, I am, in truth, following the authority of *ex parte Mure*, without thinking it necessary, for the purposes of this Case, to adopt all the principles which are there stated.

1824.
30th January.

NUNN v. BARLOW.

*Creditor.
Right
of Retainer.*

— The personal Representative may retain for his own Debt, notwithstanding a Decree has been made in a Suit by the other Creditors for the Administration of the Assets, and notwithstanding the Assets out of which he seeks to retain his Debt came to his hands after the Decree.

THIS was a Creditor's Suit. Administration to the deceased, with the Will annexed, had been granted to the Defendant *Barlow* during the minority of the Defendant *Weatherall*, the Son and Heir of the deceased. In August 1810, the usual Decree was made. About the end of that year or the commencement of the next *Weatherall* came of age, and consequently the Administration granted to *Barlow* ceased; but, in May 1811, another Administration was granted to him as *Weatherall's* Attorney; and he was also appointed Receiver of the Testator's real Estates. In March 1818 he died, and Administration *de bonis non* was granted to *Weatherall*, and he was afterwards appointed Receiver of the real Estates.

Weatherall having received Monies on account of the personal Estate as Administrator which he had not accounted for, the Plaintiffs, in March 1822, obtained an Order that he should account before the *Master* for all such Sums as he had then or thereafter might receive as the personal Representative of his late Father when he passed his Accounts before the *Master* as Receiver of the Rents and Profits of the real Estates; and the *Master* was required to include the Sum due in respect of the personal Estate in his Report of Rents and Profits.

In *Barlow's* lifetime *Weatherall* had proved a Debt under the Decree against his Father's Estate. The *Master* had reported him a Creditor for part of the Sum proved, and he was afterwards paid part of that Sum.

Upon a Motion being made for the Plaintiffs that *Weatherall* might be ordered to pay into Court the whole of the Balance reported due from him in respect of his Father's personal Estate under the Order of March 1822, he claimed to retain the Balance of the Sum which the *Master* had reported due to him.

1824.

NUNN
v.
BARLOW.

Mr. *Tinney*, in support of the Motion, said that there could be no right of Retainer in respect of Assets possessed after a Decree against the personal Representative for an Account; that the Decree was in the nature of a Judgment for all Creditors; that no Creditor could sustain an Action after a Decree; that the right of Retainer by the personal Representative stood in the place of the Creditor's Action; and that, as there could be no Action, so there could be no Retainer.

Mr. *Flather*, for the Defendant *Weatherall*, cited 3 Black. Com. 18; *Franks v. Cooper* (a), and *Robinson v. Cumming* (b), and said that an objection to the right of Retainer in that case would have lain, but that it was not taken, and that, in this case, the right of Retainer vested in *Weatherall* previous to the Decree; and that the Decree could not alter the situation of the Parties.

Mr. *Tinney*, in reply, distinguished *Robinson v. Cumming* from the present Case, saying that the Executor in that Case seemed to have retained part only of his Debt, and that the question was whether he was entitled to retain partially.

The VICE-CHANCELLOR:—

The Decree for an Account does not affect the legal priorities of Creditors; and there is no distinction in

(a) 4 Ves. 763.

(b) 2 Atk. 411.

1824.

NUNN
v.
BARLOW.

this respect between Assets possessed prior to the Decree and subsequent to the Decree. I cannot, therefore, find a principle why it should affect the legal right of the personal Representative to retain out of future Assets; and I have never heard of any authority to that effect. Order the Defendant to pay into Court the Balance of the Sum reported due from him, after deducting the remainder of his Debt.

1824.
4th February.

DOLORET v. ROTHSCHILD.

*Specific
Performance.*

A Bill will lie for the specific Performance of a Contract for the purchase of Government Stock, where it prays for the delivery of Certificates which give the legal Title to the Stock.

Time is of the essence of a Contract, where the subject of the Contract is of such a nature as to be exposed to a daily variation in its value.

IN the month of September 1823, the Defendant contracted to grant a Loan to the *Neapolitan* Government, in consideration of a certain annual Sum to be paid by that Government, called *Neapolitan* Rentes, or *Neapolitan* Stock. This Stock was brought by the Defendant into the Market, in the manner usual in cases of public Loans; and the mode in which he disposed of it was by selling Scrip Receipts, which were issued to the Purchasers on their paying ten per cent on the amount of the Stock. In these Scrip Receipts it was expressed that, on payment of the Balance on or before the 1st of February 1823, with four per cent Interest thereon from the 15th October 1822, the bearer would be entitled for that amount of Stock, with Interest from the 1st July 1822."

These Scrip Receipts were currently sold in the Money Market, in the months of December 1822 and January 1823; and during that period the Plaintiff purchased sixteen such Receipts, which would alto-

Document & Abstract. 12 Jan. 1824 Railway shares

gether have entitled him to Certificates for 12,500 *Neapolitan* Rentes.

1824.

DOLORET
v.
ROTHSCHILD.

On the 24th January 1823, the Defendant caused an Advertisement, relative to the Stock, to be published in the *Morning Chronicle* Newspaper, which was thus expressed: "At the request of several of the Holders of the *Neapolitan* Scrip Receipts, a fresh extension for the payment of the Balances will be granted by *N. M. Rothschild*, as follows: viz. five per cent to be paid on the 1st February next, with Interest due on the Receipts up to that day." The Advertisement then stated at length that the remainder of the Balances were to be paid in such instalments one every month; the last to be paid on the 15th August 1823, with Interest at four per cent from the 1st February on each instalment as it became due; and it then proceeded in these words: "The Parties who intend availing themselves of this arrangement in preference to the terms proposed in the Advertisement of the 11th instant, are required to state their intention at the time of leaving their Receipts at *Mr. Rothschild's* counting-house; as, in the event of their not doing so, they will be considered as acceding to the terms contained in *Mr. Rothschild's* former Advertisement."

On the 5th February 1823, the Defendant caused the following Advertisement to be published in the same Newspaper.

"*Neapolitan Loan of 1822.* Many of the Holders of the *Neapolitan* Deposit Receipts having failed to comply with the tenor of those engagements by which the Parties were required to pay the Balances thereof on the 1st February 1823, with the Interest accruing

1824.

DOLORET
v.
ROTHSCHILD.

up to that day, and not having availed themselves of the terms proposed for their accommodation in the Advertisements of the 11th and 23d January last, public notice is given by *N. M. Rothschild* that such Receipts are void, that the Deposit Money is forfeited, and that all obligation has ceased on his part to deliver Certificates at a future period. Being desirous, however, that no individual should suffer unknowingly on this occasion, Mr. *Rothschild* hereby notifies that he will grant to the Holders of his Receipts the indulgence of one week from this date, either to pay the Balances due by them on the 1st instant, or to make the further Deposit called for by the Advertisements of the 11th and 22d January last. 5th February 1823."

On the 12th February 1823, the Defendant caused to be published in the same Newspaper another Advertisement, as follows: "*Neapolitan Loan* of 1822. Referring to the several Advertisements of the 11th and 23d January last, and 5th February instant, which have appeared in the public Papers, giving an extension of time for payment of the Balances due upon such Receipts for the *Neapolitan Loan*, *N. M. Rothschild* informs the Holders of the Scrip Receipts, that the Loan contracted for has been paid, and the Stock Certificates are ready for delivery, and he begs that those who have not accepted the terms of extension of payment will take notice that, unless the terms are accepted, or the Balances and Interest thereon paid, on or before the 20th day of February instant, he will consider that such Holders of Scrip Receipts do not intend to complete their Contracts, and will not hereafter claim the Certificates. *N. M. Rothschild* will therefore, after the 20th February instant, dispose of or keep the Certificates and put the proceeds or value of them to the Credit of

the Holders, on account of the Balances and Interest due, and hold them accountable to him for any loss or deficiency. 11th February 1823."

1824.

DOLORET
v.

ROTHSCHILD.

In the interval between these Advertisements and up to the 20th of February 1823, as well as subsequently to that day, Scrip Receipts of the *Neapolitan* Loan continued to be publicly bought and sold in the *London* Market, with the knowledge of the Defendant. On the 12th of June 1823, the Plaintiff (who had previously told the Defendant of his having purchased the sixteen Scrip Receipts,) applied to the Defendant and offered to pay all the Instalments then due on the Receipts, none of which had been paid except the original Deposit. The Defendant having refused to allow the Plaintiff to do this, which would have entitled him to the Certificates as if the Instalments had been regularly paid pursuant to the tenor of the Receipts or of the Advertisements, the present Bill was filed.

The Bill, after stating the various facts already mentioned, charged that Time was not, in Equity, of the essence of the Contract contained in the Scrip Receipts, and was not so considered by the Defendant, as appeared from the Advertisements; or that, if Time ever was of the essence of the Contract, the same had been abandoned and waved by the acts and conduct of the Defendant.

The Prayer of the Bill was, that an Account might be taken of Principal Money and Interest due to the Defendant for the Instalments on the Scrip Receipts, and that, on payment of the Amount found due in respect of such Instalments, the Defendant might be decreed to deliver the Certificates on the sixteen Scrip Receipts,

1824.

DOLORET
v.
ROTHSCHILD.

so as that the Plaintiff might have the benefit of them and of the 12,500 *Neapolitan* Rentes: That an Account might be taken of the amount of Income received by the Defendant on the 12,500 *Neapolitan* Rentes: That the Plaintiff might have credit in account with the Defendant for the Amount so received; and that the Defendant might be decreed to make Compensation if through any fall in the price of the Stock the Certificates, when delivered to the Plaintiff, should be of less value than in June 1823; or, if the Defendant had disposed of the Certificates and should be unable to deliver them, then that he might be decreed to make full Compensation to the Plaintiff: or, if the Court should think that the Plaintiff was not entitled to any part of the relief before prayed for, that the Defendant might be decreed to pay back to him the amount of the original Deposit; and that the Defendant might be restrained from parting with the Certificates.

To this Bill the Defendant put in a general Demurrer for want of Equity.

Mr. *Pemberton* for the Demurrer:—

I. The subject matter of the Contract in this Case is such that the Court will not decree a specific performance, but will leave the Party to seek a remedy at Law if he has any. *Cud v. Rutter* (a), and *Nutbrown v. Thornton* (b), have established the principle that the Court will not compel the specific performance of an Agreement for the transfer of Stock. The same principle applies to the present Case, which does not differ from the others on this point, except in the circumstance that the subject of the Contract here is Foreign Stock.

(a) 1 P. W. 570; and 5 Vin. Abr. 538.

(b) *Ante*, 174.

Neapolitan Stock being daily in the Market here is as much within the general doctrine of the Courts, as to the specific performance of Agreements for the purchase of Chattels as *British* Stock; and it is as clear that a Court of Equity will not entertain a Bill for the performance of a Contract for the sale of it, as that it would not entertain a Bill for the performance of a Contract to sell a certain number of Casks of Tallow on a certain day.

1834.
 DOLORET
 v.
 ROTHSCHILD.

II. It is decided that, in Cases as to the specific performance of Agreements, there must be a mutuality of remedy between the Parties. Here there is no mutuality. There is no Contract entered into with the Defendant by the Plaintiff, or any individual Holder of Scrip Receipts to pay the Price. It is quite clear that he could not come into this Court to compel them to pay. He has only given to the Holders of these Receipts, on their doing certain acts, a right to Certificates for *Neapolitan* Stock. The Holders have contracted to do nothing which he can by a Decree of any Court specifically compel them to do. The only hold he has upon them is by the deposit of ten per cent.

III. Time is in this Case of the essence of the Contract. The question is, whether a Party who purchases the right to receive a certain quantity of Stock on payment of Money on a certain day, after allowing the day fixed upon to pass without paying the Money, can, when he finds a rise in the price of the Stock, acquire a right to it by paying the Money at a period long after that fixed upon for the Payment. In this Case there is a lapse, not of some days, but of many months. On the 1st of February 1823 *Neapolitan*

1824.

DOLORET

v.

ROTHSCHILD.

Stock may have been at a discount, so as to make the Holders of Scrip Receipts prefer forfeiting their deposit of ten per cent. But if, after allowing the time of Payment to elapse for any such reason, the Stock from intervening political events should happen to have risen, this Court would hardly be disposed to assist a person who allowed the time of payment to elapse, to come forward long afterwards, and claim the same benefit to which he would have been entitled if he had paid his Money in due time. It seems quite manifest that this is precisely one of those Cases in which the Court holds Time to be of the essence of the Contract. There are no exact Authorities on this subject, because the decisions which have established that the Court will not entertain a Suit for the performance of a Contract of this kind, proceed on this wise principle, that, before performance of the Contract can be decreed, the lapse of time may have altered the value of the subject of the Contract. *Seton v. Slade* (c), *Withy v. Cottle* (d). The principle on which *Sparks v. Liverpool Water Works Company* (e) was decided, is exactly applicable to this Case. It is impossible to imagine any Property as to which Time is more essentially of the essence of the Contract than Stock in public Funds, on account of the fluctuation in its Value.

Mr. Sugden and Mr. Knight, for the Plaintiff:—

The two principles contended for in support of the Demurrer are neither of them involved in the decision of the present Case.

I. The general rule that the Court will not decree specific performance of an Agreement for the transfer

(c) 7 Ves. 265.

(d) 1 Turner's Rep. 78.

(e) 13 Ves. 428.

1824.

DOLORET
v.
ROTHSCHILD.

of Stock, must be admitted; and it proceeds on the general principle that any one 1,000 *l.* of Stock is exactly similar to another 1,000 *l.* of the same Stock. The Case of *Cud v. Rutter*, quoted on the other side, in which this rule was established, is much better reported in 5 *Viner's Abridgment*, 538, than in *Peere William's Reports*; and it is remarkable that, in that Case, where the Bill prayed for the specific performance of an Agreement for the transfer of Stock, *Lord Chancellor Parker* did not dismiss the Bill. The reason that an Action at Law is a sufficient remedy, does not apply to the present Case, where the Plaintiff is prevented from obtaining relief at Law, not by any conduct of his own, but by the conduct of *Rothschild*. It is perfectly settled that it is no Answer to a Bill for specific performance to say that the Plaintiff can recover no Damages at Law. *Thompson v. Harcourt* (f). But what distinguishes this Case from those in which it has been held that the Court will not perform an Agreement to transfer Stock is, that this Bill does not pray for the transfer of Stock. It prays that the Defendant may deliver to the Plaintiff certain Certificates charged to be in his custody. It seeks for the delivery of documents by which the Plaintiff can establish his Title to the Stock.

II. As to Time being of the essence of the Contract, admitting all that has been urged on that point, what relieves the case of the Plaintiff from any application of that principle, is the charge in the Bill that, if Time was originally of the essence of the Contract, it has been waved and abandoned by the acts of the Defendant. The various Advertisements published by the Defend-

(f) 1 Bro. P. C. 193.

1824.

DOLORET
v.
ROTHSCHILD.

ant, and particularly that of the 12th of February 1823, are express abandonments of the time fixed by the original Agreement expressed in the Scrip Receipts; for, in the latter Advertisement, he expresses that, if the payments are not made in the manner therein mentioned, he will dispose of the Certificates and consider the Holders of the Receipts liable for any loss, and put the proceeds to their Credit. How is that proceeding consistent with the argument that Time is of the essence of the Contract?

Mr. *Pemberton*, in reply, insisted that Time was of the essence of the Contract, and cited *Hagedon v. Laing* (g).

The VICE-CHANCELLOR :—

I am of opinion that, inasmuch as this Bill prays a delivery of the Certificates which would constitute the Plaintiff the Proprietor of a certain quantity of Stock, the Bill in Equity will hold; because a Court of Law could not give the Property, but could only give a remedy in Damages, the beneficial effect of which must depend upon the personal responsibility of the Party. I consider also that the Plaintiff not being the original Holder of the Scrip but merely the Bearer, may not be able to maintain any Action at Law upon the Contract, and that, if he has any Title, it must be in Equity.

Where a Court of Equity holds that Time is not of the essence of a Contract, it proceeds upon the principle that, having regard to the nature of the subject, Time is immaterial to the Value, and is urged only by way of pretence and evasion. But that principle can

1823.

DOLORET
v.
ROTHSCHILD.

have no application to a Case like the present, where from the nature of the subject the Value is exposed to daily variation, and a Contract which was disadvantageous to the Plaintiff on the 1st February, and would therefore be then declined by him, might be highly advantageous to him on the 2d February. It is true, as stated in the Bill, that the time mentioned in the Scrip-receipts has been waved and abandoned by the Advertisement of the Defendant: but that waiver was upon the condition that the Holders of the Receipts made their Payments at the extended times stated in the Advertisements, which it is admitted has not been done by the Plaintiff. The claim of the Plaintiff to have the original Deposit of ten per cent returned to him, as being retained by the Defendant without Consideration, cannot be maintained, because the Plaintiff had full Consideration for that Deposit in the option which the Scrip-receipts gave him to become the Proprietor of so much Stock, by payment of the Balance of the stipulated Price on the day named; and it is not the less a Consideration because the Plaintiff did not think fit to avail himself of the option.

Demurrer allowed.

1824.
11th February.

LINGEN v. SIMPSON.

*Partners.
Specific
Performance.*

If, upon a Dissolution of Partnership, it is agreed that certain Articles of the Partnership Stock shall become the exclusive Property of one of the Partners, and that a certain Fund shall be appropriated to the payment of the Debts, and that Fund afterwards proves insufficient for the purpose, the other Partner has no Lien on those Articles in respect of such deficiency.

A Court of Equity will enforce an Agreement made upon a Dissolution of Partnership, that a particular Book used in the Trade should become the exclusive Property of one of the Partners, and that a Copy of it should be delivered to the other.

IN 1815, the Defendant and one *Ellis* entered into Partnership together in the Trade of a Coach-founder and Plater. The business consisted in the making of Metal Ornaments for Carriages, and other Articles. The Partners, in order to enable the Tradesmen whom they supplied with these Articles, to give them Orders in the most convenient manner, furnished them with Books containing Plates of the Articles, and kept themselves two Books, called N° 1 and N° 2, containing similar Plates. Every Plate in the Books delivered to the Tradesmen was numbered; and the corresponding Plate in the Books kept by the Partners had the same number annexed to it: so that when the Tradesmen sent Orders for any of the Articles, instead of giving a description of them, they denoted them by the Numbers annexed to those Articles in their Books, and the Manufacturers, by referring to the Books N° 1 and N° 2, immediately ascertained which of the Articles the Tradesmen wanted. In March 1820, the Defendant and *Ellis* dissolved Partnership. Upon the Dissolution they agreed that the Stock in Trade should be equally divided between them: that the Debts due to the Partnership should be applied in payment of the Debts due from it: that *Ellis* should have the Book called N° 1, and the Defendant that called N° 2; and that each of them should have a Copy of the other's Book, and have the use of the Original until the Copy was made. The Stock in Trade was accordingly divided between them: the Books N° 1 and N° 2 were placed

in the hands of a third person in order that the Copies might be made; and each of the Parties began to carry on the Business separately. Shortly afterwards *Ellis* formed a Partnership with one *Smith*, which continued a few months only. He then entered into Partnership with the Plaintiff; and soon afterwards a separate Commission of Bankrupt issued against him. The Plaintiff purchased of the Assignees all *Ellis's* share and interest in the Partnership Property, Stock and Effects. After this the Defendant sent a message to the Plaintiff, saying that he wanted N^o 2, (the Copy of which was not then completed) for the purpose of making an article by it; and it was accordingly delivered to the Defendant for that purpose; but upon the Plaintiff applying to have it returned, the Defendant refused to deliver it up, alleging as a reason for his so doing, that the Debts due to the first Partnership were inadequate to pay those that were due from it, and that *Ellis's* Estate was liable to make up one Moiety of the deficiency. Under these circumstances the Bill was filed to enforce the Plaintiff's right to have a Copy of N^o 2 made and delivered to him.

1824.
LINGEN
v.
SIMPSON.

Mr. Hart and Mr. Farrer for the Plaintiff:--

It was impossible for the Plaintiff to adopt any other course than that of applying to a Court of Equity for the relief he seeks, for no Action at Law could have been brought in this Case. The Defendant now resists part only of the original Agreement. That Agreement has been fully performed in every respect, except as to the making of this Copy. It will be said for the Defendant that he has a right to retain this Book because the Debts of the Partnership are not paid. We admit that one Partner cannot discharge the Lien which the Creditors have on the Partnership Property, but he

1824.

LINGER
v.
SIMPSON.

may give to his Co-partner a separate Interest in all or any part of the Partnership Property. This is a question, not between the Partners and the Creditors, but between one of the Partners and a person claiming under the other. This Lien is not set up by the Creditors, but by one of the Partners for his own benefit. He cannot have any claim upon this Book, except what he is entitled to under his Agreement with *Ellis*; and the setting up of this Lien is in direct breach of that Agreement.

Mr. *Horne* and Mr. *Cooper* for the Defendant, insisted, first, that a Court of Equity could not interfere in this Case; secondly, that, if it could interfere, the Plaintiff could only stand in the place of *Ellis*, and that *Ellis*, upon the whole, was a Debtor to the Defendant upon the Partnership Accounts, and could only have the relief he prayed upon the Terms of paying what was so due to the Defendant; and thirdly, that the Plaintiff had not established his Title to stand in *Ellis's* place.

The VICE-CHANCELLOR:—

It is established by the Evidence of *Ellis*, who is a good Witness against his own Estate, that his right in the Reference-books became a part of the Co-partnership Estate of himself and the Plaintiff, and, consequently, well passed to the Plaintiff by the purchase from the Assignees of *Ellis's* Share and Interest in the Co-partnership Estate, Stock and Effects.

I fully accede to the proposition that the Plaintiff can stand, as against the Defendant, in no better situation than *Ellis* himself would have stood if he had not parted with his interest in the subject of the Suit; and,

if these Reference-books remained Partnership Property, it would be unquestionable that the Plaintiff could not be entitled to relief without a general arrangement of the Partnership concerns; for, until such general arrangement, no Partner can claim an exclusive right in any article of the Partnership Property. But upon a Dissolution any part of the Partnership Property may, by Contract of the Partners, be converted into the separate, individual Property of either; and it is clear here that, upon the Dissolution between the Defendant and *Ellis*, the Reference-book N° 1 became the separate Property of *Ellis*, and the Reference-book N° 2 became the separate Property of the Defendant, subject to the delivery of the Copy to *Ellis* and the interim inspection in the mean time; and the Claim of the Plaintiff by this Bill does not, therefore, refer to any Article of Partnership Property.

It is argued that a Court of Equity will not interfere in such a matter. The principle upon which a Court of Equity interferes to enforce Contracts is, that the particular relief prayed cannot be had in a Court of Law; and a Court of Law has no means of compelling this Defendant to permit the Copy of N° 2 to be completed, or to permit the interim inspection of the Book by the Plaintiff. Decree therefore according to the Prayer of the Bill, with Costs.

1824.

LINGEN
v.
SIMPSON.

1823,
15th December.
1824,
20th February.

Will.

Testator gave his Son an absolute Interest in one-fourth of his personal Estate; but, by a Codicil, he directed that his Son's Share should be only for the life of himself and his Wife, provided they had no Issue; and that, at their death, it should fall into the Residue. Held, that the Son did not take absolutely, but subject to an executory Bequest over, in case there was no Issue of himself and his Wife living at the death of the Survivor.

RACKSTRAW v. VILE.

JOHN SMITH in his Will, after making a provision for his Wife, expressed himself as follows :

" I give unto my Son *William John Smith* all my Right, Title and Interest in one moiety of the House and Premises, N^o 78, *Blackman-street, Southwark*; this I value at 500 *l.*; and, as he has received of me in Cash 500 *l.* I request that 1,000 *l.* be deducted from his fourth equal Share of my whole Property intended to be divided between my four Children; that is to say, all my real and personal Estate, of whatever nature or description, which I may die possessed of, together with the rest and residue of that which I have herein given to my Wife, at her decease, shall be equally divided, share and share alike, between my Son as aforesaid, subject to the deduction above-stated, to my Daughter *Mary Ann Blunt*, my Daughter *Elizabeth Margaret Smith*, and my Daughter *Sarah Smith*, and their respective Heirs, but not to be subject to the Debts or Controul of the Husband of my Daughter *Mary Ann Blunt*, or of the Husband which either of them may marry. My Daughter *Mary Ann* having received 500 *l.* at her Marriage with *Robert Blunt*, I request that Sum to be deducted from her fourth part also; and, should either or both of my other Daughters receive their Marriage Portions before my decease, the deductions are to be made in like manner, to the intent that each one shall have an equal share; and, in case of the demise of either of my Children before they arrive at the age of twenty-one years, the deceased's

share shall fall into and become a part of the rest and residue, for the benefit of the Survivors, their Heirs and Executors."

1823.

RACKSTRAW
v.
VILE.

The Testator afterwards made the following Codicils to his Will :

" By way of Codicil to my Will: I hereby request that the equal Share of my Estate which may fall to my Son *William John Smith*, may be only for the term of his own and his Wife's natural lives, provided there is no Issue, but that, at their decease, it shall become a part of and fall into the rest and residue."

" By way of second Codicil to my Will: I hereby request that the Portion or Share of whatever Property I may die possessed of, which I have bequeathed to my Son *William John Smith*, shall be only for the natural life of himself and his Wife, provided they have no Issue; and, at their death, it shall become a part of the rest and residue."

Both these Codicils were unattested.

The Bill was filed by *Samuel Sambrook Rackstraw* and *Elizabeth Margaret* his Wife, (one of the Testator's Daughters), and *Sarah Smith*, another of the Testator's Daughters, against the Executor, the Widow, Mr. and Mrs. *Blunt*, and *William John Smith*. It charged that, if *William John Smith* died without leaving Issue by his Wife him surviving, his Interest in the Testator's personal Estate would become vested in *Elizabeth Margaret Rackstraw*, *Sarah Smith*, and *Mary Ann Blunt*. It prayed that an Account might be taken of the Testator's personal Estate possessed by his Execu-

1823.

RACKSTRAW

v.

VILE.

tor; that it might be applied in a due course of Administration; and that one fourth part of the clear surplus, less the Sum of 1,000 *l.* might be laid out and invested at Interest for the benefit of *William John Smith* during the life of himself and his Wife, and, in case they should leave no Issue them surviving, for the benefit of *Elizabeth Margaret Rackstraw, Sarah Smith, and Mary Ann Blunt*, in equal shares and proportions.

William John Smith, by his Answer, insisted that his share of the Testator's Estate ought to be paid to him for his own absolute use and benefit.

Mr. *Heald* and Mr. *Bickersteth*, for the Plaintiffs, contended that *William John Smith* did not take an absolute Interest in the one fourth of the Testator's Estate which was bequeathed to him; but that, under the Codicils, it would go over to his Sisters in case there was no Issue of himself and his Wife living at the decease of the Survivor of them.

Mr. *Sugden* and Mr. *Moore*, for the Defendant *William John Smith*, said that, as a Devise to a person, and, provided he had no Issue, then over to another, would give the first taker an Estate Tail in Lands, so it would give the absolute Interest in personal Estate; and that the failure of Issue was to be considered as a general failure of Issue, and could not be confined to the death of the Survivor of the Husband and Wife, unless words could be found, either in the Will or Codicils, which expressly limited it to that event.

The VICE-CHANCELLOR:—

This Codicil, being unattested, speaks only as to personal Estate. The Will and Codicil, taken together,

give the personal Estate, in the first instance, absolutely to the Son *W. J. Smith*, with a good Limitation over, by way of Executory Devise, at the death of the Survivor of himself and his Wife, if there be no Issue then living. The failure of Issue is plainly confined to the death of the Survivor, by the direction that the Share of *W. J. Smith* is to become a part of the rest and residue at their death.

1823.
RACKSTRAW
v.
VILB.

ADDERLEY v. DIXON.

THE Plaintiffs having purchased and taken Assignments of certain Debts which had been proved under two Commissions of Bankrupt, agreed to sell them to the Defendant for 2s. 6d. in the Pound.

1823.
8th December.
1824.
23d February.

*Specific
Performance.*

The Defendant's Solicitor, accordingly, gave notice of the Sale to the Assignees, and prepared an Assignment of the Debts, and the Plaintiffs, notwithstanding the Purchase Money had not been paid, executed it, and signed the Receipt for the Consideration Money, and left it in the Solicitor's hands. The Bill was filed to compel the Defendant specifically to perform the Agreement, and to pay the Purchase Money to the Plaintiffs.

Specific Performance decreed, at the Suit of the Vendor, of a Contract for the Sale of Debts proved under a Commission of Bankrupt.

The Defendant, by his Answer, submitted that the matter of the Agreement was not the proper subject of a Bill in Equity for a specific performance; and claimed the same benefit as if he had demurred to the Bill.

Mr. Sugden and Mr. Garratt for the Plaintiffs:—

It is not stated in the Bill whether this Agreement was in writing or not. But that is not material, as it

1823.
 ADDERLEY
 v.
 DIXON.

has been decided that an Agreement for the sale of a Debt is not within the Statute of Frauds. *Anstey v. Marden* (a).

With respect to the question, whether this Court has jurisdiction to decree a specific performance of an Agreement for the sale of a Debt, the Case of *Wright v. Bell* (b) contains the Judgment of the late Chief Baron upon the very point. That Case was discussed before your Honor in *Withy v. Cottle* (c), and your Honor there decreed a specific performance of an Agreement for the purchase of an Annuity payable out of the Dividends of Stock. It is settled that a person who wants a specific Chattel may come into this Court to have it delivered to him, as in the Case of the *Pusey Horn* (d), and the Tobacco-box (e). If then the Purchaser in this Case might have filed a Bill for a specific performance of the Agreement, the Vendors must have the same privilege; for the remedy must be mutual. The reason why the Court refuses to decree a specific Performance of a Contract for a Transfer of Stock, is that one sum of Stock is the same as another. Here the Plaintiffs cannot get what they have contracted for, except by the aid of this Court. They want not the Money of any particular person, but the Sum for which they have agreed to sell these Debts. If they went to Law they might get more or less; but they have a right to have the very Sum of Money. Independently of this, the Plaintiffs are entitled to the benefit of the Defendant's Oath, and to call upon him to say whether there was or was not such a Contract as is stated in

(a) 1 New Rep. 124.

(b) Dan. 95.

(c) Ante, 174.

(d) *Pusey v. Pusey*, 1 Vern. 273.

(e) *Fells v. Read*, 3 Ves. 70. See also *Duke of Somerset v. Cockson*, 3 P. W. 370.

the Bill, and also to have a Lien on the subject which they have contracted to sell. *Lewis v. Lord Lechmere* (f). We submit, therefore, that, both upon principle and authority, the Plaintiffs are entitled to the relief prayed by this Bill.

1823.
 ADDERLEY
 v.
 DIXON.

Mr. *Hart* and Mr. *Treslove* for the Defendant:—

As the Assignment of these Debts has been executed and actually delivered to the Defendant's Solicitor, nothing remains to be done but the Payment of the Money. If the Court, therefore, were to make a Decree in this Case it would, in effect, be nothing more than a Verdict in an Action of Assumpsit for the Amount of the Purchase Money. A Court of Equity lends its aid to the execution of executory Agreements only. Here the Plaintiffs demand is a mere legal Debt.

It is not clear that in the converse of this Case relief would have been given in this Court. Suppose the Defendant had filed a Bill for a specific performance of this Agreement, would it not have been said that this Court gives relief only where the specific thing is wanted, and Damages are not a sufficient Compensation? *Buxton v. Lister* (g), *Dorison v. Westbrook* (h).

The Case of *Wright v. Bell* differs from this Case; for there the Defendant waved all objections except as to the Title, and the Lord Chief Baron notices that circumstance in his Judgment. That is not the case here; for this Defendant insists upon the want of Jurisdiction in this Court to decree a specific performance in the present Case.

(f) 10 Mod. 503. 506.

(g) 3 Atk. 383.

(h) 5 Vin. Ab. 548, pl. 22.

1823.

ADDERLEY

v.

DIXON.

Mr. *Sugden* in reply said, that, whether the Court could or could not decree a specific performance of the Agreement must depend upon the nature of it, and not upon the proceedings which had been taken towards its completion; and that, if the Plaintiffs were entitled to that relief upon general principles, it would be hard to deprive them of it because they had performed their part of the Contract.

The VICE-CHANCELLOR:—

Courts of Equity decree the specific performance of Contracts, not upon any distinction between Realty and Personalty, but because Damages at Law may not, in the particular case, afford a complete remedy. Thus a Court of Equity decrees performance of a Contract for Land, not because of the real nature of the Land, but because Damages at Law, which must be calculated upon the general Money-value of Land, may not be a complete remedy to the Purchaser, to whom the Land may have a peculiar and special Value. So a Court of Equity will not, generally, decree performance of a Contract for the Sale of Stock or Goods, not because of their personal nature, but because Damages at Law, calculated upon the Market-price of the Stock or Goods, are as complete a remedy to the Purchaser as the delivery of the Stock or Goods contracted for; inasmuch as, with the Damages, he may purchase the same quantity of the like Stock or Goods.

In *Taylor v. Neville*, cited in *Burton v. Lister*, specific performance was decreed of a Contract for Sale of 800 Tons of Iron, to be delivered and paid for in a certain number of Years and by Instalments; and the reason given by Lord *Hardwicke* is that such sort of Contracts differ from those that are immediately to be executed,

1824.

ADDERLEY
v.
DIXON.

And they do differ in this respect, that the profit upon the Contract, being to depend upon future events, cannot be correctly estimated in Damages where the calculation must proceed upon conjecture. In such a case, to compel a Party to accept Damages for the non-performance of his Contract, is to compel him to sell the actual Profit which may arise from it, at a conjectural Price. In *Ball v. Coggs* (i), specific performance was decreed in the House of Lords of a Contract to pay the Plaintiff a certain annual Sum for his life, and also a certain other Sum for every Hundred-weight of Brass-wire manufactured by the Defendant during the life of the Plaintiff. The same principle is to be applied to this Case. Damages might be no complete remedy, being to be calculated merely by conjecture; and to compel the Plaintiff in such a case to take Damages would be to compel him to sell the annual Provision during his life for which he had contracted, at a conjectural price. In *Buxton v. Lister*, Lord *Hardwicke* puts the case of a Ship-carpenter purchasing Timber which was peculiarly convenient to him by reason of its vicinity; and also the case of an Owner of Land covered with Timber contracting to sell his Timber in order to clear his Land; and assumes that as, in both those cases, Damages would not, by reason of the special circumstances, be a complete remedy, Equity would decree specific performance.

The present Case being a Contract for the Sale of the uncertain Dividends which may become payable from the Estates of the two Bankrupts, it appears to me that, upon the principle established by the Cases of *Ball v. Coggs*, and *Taylor v. Neville*, a Court of Equity

(i) 1 Bro. P. C. 140.

1824.

ADDERLEY
v.
DIXON.

will decree specific performance, because Damages at Law cannot accurately represent the value of the future Dividends; and to compel this Purchaser to take such Damages would be to compel him to sell these Dividends at a conjectural price.

It is true that the present Bill is not filed by the Purchaser, but by the Vendor, who seeks, not the uncertain Dividends, but the certain Sum to be paid for them. It has, however, been settled, by repeated decision, that the remedy in Equity must be mutual; and that, where a Bill will lie for the Purchaser, it will also lie for the Vendor.

1824.

23d & 24th
February.

CORBET v. CORBET.

Dower. Jointure.

THIS was a Bill by a Widow, claiming Dower out of the Estates of which her Husband was seised.

Widow held to be barred of her Dower in Equity by a Rent-charge granted in Trust for her by way of Jointure by the Marriage Settlement, to which her Father was a Party, although she was an Infant at the time of the Marriage, and the Rent-charge failed by defect of Title in the Husband, and was afterwards confirmed by Deed and Recovery during the Coverture; which, though they proved a valid Confirmation, might have been defeated if there had been a Son of the Marriage.

At the time of the Marriage between the Plaintiff and *Edward Corbet*, her late Husband, he was, under a Settlement made in the year 1758, entitled, as Tenant for Life in possession, to certain Freehold Estates in the County of *Merioneth*, with Remainder to his first and other Sons in Tail, with Remainders over, with power to grant to the use of any Wife he should marry, as a Jointure, such part of the Estates comprised in the Settlement as he should think fit, so as such Jointure should not exceed the sum of 10*l.* yearly for every 100*l.* which

he should receive as a Fortune with such Wife; and so as the Fortune of such Wife should be settled upon the Children of the Marriage; and if no Child or Children, so as her Fortune should be applied in discharge of Incumbrances upon the Estates.

 1824.

CORBET
v.
CORBET.

The Plaintiff, at the time of her Marriage, was an Infant of the age of Nineteen, and had no Fortune.

By an Indenture, dated the 4th of September 1813, executed previously to and in contemplation of the Marriage, and made between *Edward Corbet* of the first part, the Plaintiff and her Father of the second part, and two Trustees of the third part, *Edward Corbet*, in consideration of the Marriage, granted and confirmed to the Trustees, their Executors, Administrators and Assigns, a yearly Rent-charge of 100*l.* for the natural life of the Plaintiff, in case she survived him, to be issuing out of the Estates and Hereditaments after mentioned, with powers of Entry and Distress; and for better securing the payment of the Rent-charge, and by virtue of the power contained in the Settlement of 1758, *Edward Corbet* demised to the Trustees, their Executors, Administrators and Assigns, part of the Estates comprised in the Settlement of 1758, for the term of 99 years if the Plaintiff should so long live, without impeachment of Waste, upon Trust to secure the Rent-charge of 100*l.*; and, in case of his decease leaving the Plaintiff surviving him, to pay it to the Plaintiff for her life; and it was thereby agreed between all Parties that the Rent-charge and the other provisions thereby made for the Plaintiff should be in full for her Jointure and in bar of her Dower.

1824.

CORBET
v.

CORBET.

The Marriage took place soon after the date of this Deed. It was afterwards discovered that, as the Plaintiff had no Fortune, the Rent-charge could not be granted under the Power in the Settlement of 1758. There was Issue of the Marriage only one Daughter. *Edward Corbet*, upon discovering the defect in the grant of the Rent-charge, applied to the next Tenant in Tail in Remainder expectant on his own death without Issue to confirm the Rent-charge. The next Tenant in Tail accordingly agreed to confirm it; and a recovery of the Estates was suffered in 1819, the uses of which were, by an Indenture duly executed, and to which the Plaintiff was named as a Party, declared to secure the Rent-charge of 100*l.* to the Plaintiff for her Jointure.

Edward Corbet being also seised in Fee of other Estates, devised them to various Persons, who were Defendants to this Bill.

Edward Corbet died in 1820, leaving Issue only one Daughter, an Infant.

The Bill waved the Jointure of 100*l.* a year, and charged that the Settlement of 1813 was fraudulent and delusive; and that the Recovery and the Deed declaring the uses of it were executed without her knowledge, without her being consulted upon the subject, and during her Coverture.

The Defendants, by their Answer, insisted that the Rent-charge of 100*l.* to the Plaintiff was a bar to her Dower.

The Cause now came on to be heard.

1824.

Mr. Sugden and Mr. J. Martin, for the Plaintiff:—

CORBET

v.

CORBET.

The Instrument by which the Jointure was created in this Case is a mere nullity. It professes to be granted pursuant to a Power, according to the terms of which it could not be a valid Jointure to the Plaintiff, because she had no Fortune. It is now perfectly established that an Infant cannot be barred of her Dower, unless the Provision in lieu of Dower is as certain as the Dower itself. *Drury v. Drury* (a), *Carruthers v. Carruthers* (b). In the latter Case it was held that the Wife was not bound by the Jointure, because it might have happened according to the Limitations, that it could not come into Possession immediately on the death of the Husband. It is indeed mentioned by Lord Eldon, in *Milner v. Lord Harewood* (c), that Lord Thurlow agreed with Lord Northington in thinking a female Infant could not be bound by a Settlement. But that fact is now mere matter of curiosity; because, since the decision in *Drury v. Drury* by the House of Lords, the Law must be considered as settled, that the Infant may be bound if the Jointure be certain and proper in all respects. In *Carruthers v. Carruthers* (d), the *Master of the Rolls* discusses the very question that arises in this case, for he says: "It is said that Guardians have a power to bind the right of the Infant; but I think *Drury v. Drury* did not mean to decide that, if the Provision had not been certain, or if she was only to take upon a remote Contingency. Before I perform an Agree-

(a) 2 Eden, 39; Wilmot's Judgments and Opinions, 177.

(b) 4 Bro. C. C. 500.

(c) 18 Ves. 275.

(d) 4 Bro. C. C. 512.

1824.

CORBET
v.
CORBET.

ment, I must see that it is reasonable." And a little afterwards he says what is exactly applicable to this Case: "Suppose she had had a Jointure which turned out to be bad, I mean which would not have afforded her the same advantage which she would have had from her Dower, would that have bound her? *If it is good at all* it must be from the making of the Settlement." The very same doctrine was acted upon in *Smith v. Smith* (e). *Cray v. Willis* (f) goes much farther; but it must be admitted that, since *Drury v. Drury*, the extent of the doctrine laid down there has been qualified. Here the Husband had no right to grant the Rent-charge; he was mere Tenant for life; and the Settlement refers to a Power of which it cannot be a valid execution. The question then is, whether the subsequent Deed of 1819 was a confirmation of the Deed of 1813, so as to make a valid Jointure in bar of Dower? Lord *Alvanley* says that, if a Jointure be good at all, it must be good from the date of it. The Stat. 27 Hen. VIII. of Uses, on which the doctrine of Dower rests, provides that, where any Provision is made for a Woman by Jointure after Marriage, the Wife has her election. It is impossible to put this case higher than a case of Jointure after Marriage. The Plaintiff has therefore a right to elect. The rule that the Jointure, to be a good bar, must be good at the time when it is made, is quite inconsistent with the notion that the Deed of 1813 is a valid confirmation of the Jointure so as to exclude the right to Dower; because it was not a good confirmation at the time when it was made. If the Plaintiff had had male Issue, her Son would have been Tenant in tail, and the Recovery could not have made the Rent-charge good.

(e) 5 Ves. 189.

(f) 9 Vin. Abr. 249, pl. 18.

Mr. *Fonblanque*, Mr. *Temple* and Mr. *Ward*, for the Defendants :—

1824.

CORBET
v.
CORBET.

Both Lord *Hardwicke* and Lord *Mansfield* who concurred in the decision in *Drury v. Drury*, in the reasons which they give for their opinion, state Cases which are exactly applicable to the present, and show that this is a valid Jointure. Lord *Hardwicke* in particular says (g), that, even where the Agreement is originally bad, if there be a general Agreement it will be good. The Cases of *Vizard v. Longden* (h) and *Davila v. Davila* (i) are decisive on this point. The only question is, whether there is an Agreement on the part of the Husband. The Deed of 1813 is decisive as to this, for it states an Agreement. It is true that the Agreement could not be carried into effect by that Deed; but it is not the less binding, and the Plaintiff has no cause for complaint. Though the Agreement be not binding on the Lands which purport to be charged with it by the Deed of 1813, yet the Court will enforce it as to Lands of adequate value. The Charges of Fraud in the Bill are wholly unsupported and must be abandoned. Both the Plaintiff and her Father were Parties to the Deed, and there is no pretence for saying more than that there was a mere failure of Title owing to mistake. If the Plaintiff had been adult at the time of executing the Deed of 1813, she would certainly have been bound by it. *Simpson v. Gutteridge* (k). But the Law holds that, where an Infant is dealing by her legal Guardian, in such a Case she shall be bound by the Deed. If this had been the Case of a legal Jointure, there can be no doubt that

(g) 2 Eden, 68.

(h) Stated by Lord *Hardwicke* in *Drury v. Drury*, 2 Eden, 66.

(i) 2 Vern. 274.

(k) 1 Madd. 609.

1824.

CORBET
v.
CORBET.

the Infant would have been bound by the Statute (*l*). It is a mistake to suppose that, under the Statute 27 Hen. VIII. if the Title to the Jointure fails, the Wife has her Dower for the whole; because the words are, that she shall be endowed only of so much as she shall be evicted of. It is enough for the Defendants to say that the Settlement of 1813 amounts to a Contract by the Infant to accept a Jointure in lieu of Dower. *Harvey v. Ashley* (*m*). The principle laid down there goes to establish this, that if the Law gives an Infant authority to contract Marriage, it also must clothe the Infant with all the Authorities necessary to make every part of the Contract valid. There is no Case to be found in which it has been held that, where there was no Fraud, and where the Guardian was a party to the Agreement of the Infant, the Infant was not absolutely bound to accept a Jointure in lieu of Dower. In the Cases on this subject what is sought is to have the Jointure established, and not to have Dower as here. *Clifford v. Burlington* (*n*), *Hollingshead v. Hollingshead* (*o*), *Glegg v. Glegg* (*p*). It must be admitted that, when the Title to the Rent-charge under the Deed of 1813 failed, the Husband was bound to make it good. It is not pretended that the Rent-charge is not now valid under the Deed of 1819, and the Recovery.

Mr. Sugden in reply:—

The provision, to be a good bar of Dower, must be certain from the time when it was made. Substitu-

(*l*) The Authorities as to how far an Infant is bound, are collected in Mr. *Roper's* Treatise on the Law of Husband and Wife, 471.

(*m*) 3 Atk. 607.

(*n*) 2 Vern. 379.

(*o*) Gilb. Eq. Rep. 167.

(*p*) 2 Eq. Abr. 27. pl. 32.

tion of a certain Provision for one which has failed, leaves the Wife to her election. This must be a good legal Jointure, or it is nothing. And it is clear the Husband was not, at any one moment during the Coverture, seised of such an Estate as to enable him to make the Rent-charge valid. A decision against the Plaintiff would enable a Party to make a bad Jointure, and, during the whole period of the Coverture, to keep it in his power to confirm it or not. This is not a Contract by the Husband, but an absolute Provision by way of Jointure, which turns out to be such as the Husband could not grant.

1824.

CORRET
v.
CORRET.

The VICE-CHANCELLOR :—

The argument for the Plaintiff is that, inasmuch as she was an Infant at the time of the Marriage, and as the Rent-charge proposed to be given to her in bar of Dower was then uncertain by reason of the defect of Title in the intended Husband to the particular Lands, she is therefore entitled, upon the authority of *Carruthers v. Carruthers*, to renounce this Rent-charge, although it has now become effectual, and to resort to her Dower.

In *Carruthers v. Carruthers*, upon the Marriage of a female Infant, a particular Estate, with the consent of her Father who with her was a Party to the Conveyance, was settled upon the Husband's Mother for life, with Remainder to the Husband for life; Remainder to the intended Wife for life in bar of Dower. This which in form was a legal Jointure was bad at Law under the Statute, because by reason of the Mother's Life Estate it might not certainly take effect in Possession at the death of the Husband; and the single question before Lord *Alvanley* was, whether, in respect

1824.

CORBET

v.

CORBET.

that the Father assented to this intended Jointure, Equity would make that good which at Law was clearly void. Lord *Alvanley* held that the assent of the Father could not bind the Infant to accept a Jointure which wanted one of the essential qualities required by the Statute.

In the present Case the professed Jointure is equitable and not legal, being given to Trustees for the benefit of the Wife, and not directly to the Wife herself. In order to try the application of *Carruthers v. Carruthers*, let it be assumed that the professed Jointure was legal, and given directly to the Wife herself: and then it is to be asked whether this being a legal Jointure, the Plaintiff could, under the actual circumstances, renounce it and claim her Dower. Now the 7th section of the Statute of Hen. VIII. expressly provides that a Wife, evicted of her Jointure, shall be remitted to her Dower only *pro tanto*. If this, therefore, had been a legal Jointure, and the Settlement had wholly failed as to the particular Lands by the defect of Title in the Husband, the Plaintiff could only have claimed Dower to the extent of 100 *l.* a year; and consequently when the Settlement does not fail by reason of subsequent confirmation, if this were a legal Jointure she must be bound by it.

Wife evicted of Jointure is by Stat. 27 Hen. VIII, c. 10, s. 7, entitled to Dower only *pro tanto*.

If this Jointure would, under the circumstances, have bound the Plaintiff by the express provisions of the Statute if it had been legal, without the assent of her Father, then the only question here is, whether the assent of the Father shall remove the objection which arises under the Statute from the mere equitable quality of the Jointure; and all the Authorities concur that the assent of the Father or Guardian shall have that effect.

There is another view to be taken of this Case. A grant of a Rent-charge upon particular Lands in consideration of an intended Marriage is, in Equity, if the Grantor be evicted from the particular Lands, a general Agreement to grant a Rent-charge of that amount to be issuing out of some Lands. And it is decided in *Drury v. Drury*, that such a general Agreement will, in Equity, bind a female Infant, where the Parent or Guardian assents to it.

Bill dismissed, without Costs.

Grantor be afterwards evicted, being in Equity a general Agreement to grant a Rent-charge of that amount out of some Lands, will bind the Infant if her Parent or Guardian assented to it.

1824.

CORBET
v.
CORBET.

Grant of a Rent-charge out of particular Lands to an Infant, in consideration of Marriage, for her Jointure, though the

I N D E X.

ACCOUNT.

1. Where payments have been made by a vendee at different times on account of his purchases, all exceeding the interest due at the times of such payments, and the decree in a suit by the vendor for a specific performance directs an account to be taken of what is due to the plaintiff for the principal and interest in respect of the purchase, rests are always made in taking the account. [*Griffith v. Heaton.*] - - - 271
2. The mere fact of the delivery of an account, without evidence of acquiescence, does not afford sufficient legal presumption of settlement. [*Irvine v. Young.*] - - - 333

ADVANCEMENT.

A tenant in possession of copyholds grantable for lives, procured, at his own expense, a grant to be made to his son in remainder; and, at the same time, surrendered to the use of his will. Held, that the son was not entitled to the estate granted to him, for his advancement, but was a trustee for his father. [*Prankerd v. Prankerd.*] - - - - - 1

AGREEMENT.

1. If a bill for the specific performance of an agreement states that the agreement was in writing, signature will be presumed. [*Rist v. Hobson.*] 543
2. See PARTNERSHIP, 4.

AMENDMENT.

1. Where a bill had been amended three times, and the two last amendments were made necessary by the negligence or error of the plaintiffs, the defendant was allowed extra costs for those amendments. [*Watts v. Manning.*] - - - - - 421
2. See PRACTICE, 10. 14, 15. 36.

ANNUITY.

1. A married woman being entitled to an annuity of 200 *l.* out of the dividends of 10,500 *l.* four per cent stock; which, subject to the annuity, was divisible amongst the children of herself and her husband, as he should appoint; the husband appointed 2,500 *l.* to his eldest son: The court refused to order that sum to be transferred to the son, although

- the remainder would have been much more than sufficient to pay the annuity. [*Breton v. Lord Clifden.*] 363
2. Where an annuity is given by will, with a direction that it shall be paid monthly, the first payment is to be made at the end of a month after the testator's death. [*Houghton v. Franklin.*] - - - - - 390
3. A testator having directed an annuity to be paid out of his personal estate, a sum of five per cent stock was, in the course of the cause, ordered to be set apart to answer the annuity. This fund having become insufficient for the purpose by the conversion of the five per cents into four per cents, the deficiency was directed to be supplied out of another fund, to which other persons interested in the residue had been declared to be entitled. [*Davies v. Wattier.*] - - - - - 463
- order for the wife to answer separately, puts in a separate answer, stating that his wife did not live with him, and that he had no influence over her; and being taken into custody on an attachment for want of his wife's answer, the Court ordered him to be immediately discharged, and the wife to answer separately, and indemnify her husband in respect of costs. [*Garcy v. Whittingham.*] - - - - - 163
4. Where husband and wife are defendants, and the husband is abroad, the plaintiff may obtain an order that the wife shall answer separately. - - - - - 163
5. *Qu.* Whether either the plaintiff or the husband can obtain this order without notice to the wife, and whether the husband can put in a separate answer before any such order is made? - - - - - 163
6. A general answer, even where it includes an answer to all the particular charges, is insufficient; therefore, where the bill asked, whether, on the marriage of W. a settlement of part of the property of M. was not executed, an answer that no settlement of any property was executed at the marriage of W. was held insufficient. [*Wharton v. Wharton.*] - - - - - 235
7. After a demurrer overruled, an order for time to answer merely can be obtained by special application only. [*Trim v. Baker.*] - 469
8. See *BARON AND FEME*, 1, 2, 3.—*IMPERTINENCE*, 11.—*PRACTICE*, 8, 9.

ANSWER.

1. A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on filing a fourth answer. [*Balfour v. Farquharson.*] - - - - - 2
2. An answer filed on the seal day is too late to prevent a motion to extend the common injunction, although the motion, on account of the pressure of business, was not made until the following day. [*Whitehouse v. Hickman.*] - - 102
3. Husband and wife being defendants, the husband, without obtaining an

ASSETS.

1. *Qu.* Whether there can be a decree to marshal the assets where the heir at law is an infant? [*Pott v. Gallini.*] - - - - - 209
2. A testator having directed an annuity to be paid out of his personal estate, a sum of five per cent stock was in the course of the cause ordered to be set apart to answer the annuity. This fund having become insufficient for the purpose by the conversion of the five per cents into four per cents, the deficiency was directed to be supplied out of another fund, to which other persons interested in the residue had been declared to be entitled. [*Davies v. Wattier.*] - - - - - 463
3. The personal representative may retain for his own debt, notwithstanding a decree has been made in a suit by the other creditors for the administration of the assets, and notwithstanding the assets out of which he seeks to retain his debt came to hands after the decree. [*Nunn v. Barlow.*] - - - - - 588
4. *See* RESIDUE.

ATTACHMENT.

1. A defendant against whom an attachment with proclamations has issued, may put in a plea and answer, if the writ has not been returned; but cannot do so if the writ has been returned. [*Sanders v. Murney.*] - - - - - 225
2. *See* BARON AND FEME, 4.—PRACTICE, 8, 9. 20.

AWARD.

1. Where it is one of the terms of an agreement to refer disputes to arbitration, that the submission shall be made a rule of a court of common law if either party require it, this Court has no jurisdiction to relieve against the award, although the submission has not been made a rule of the court of common law within the time limited by the statute. [*Davis v. Getty and others.*] - - - - - 411
2. Where an agreement of reference provides that the award shall be made by four persons, or any three of them, and the award purports to be the award of the four, but is executed by three of them only, it is void. [*Thomas v. Harrop.*] - 524
3. Injunction to stay proceedings on an award, on the ground of fraud and corruption, refused, where the submission was, within due time, made a rule of the court of King's Bench, although the bill was filed before the submission was made a rule of that court, and although it might, according to the agreement, have been made either a rule of this Court or of the court of K. B. [*Dawson v. Sadler.*] - - - 537

BANKRUPT.

1. A general demurrer allowed to a bill by the assignees of a bankrupt to restrain an action by him to try the validity of the commission. [*Kirkpatrick v. Dennett.*] - - 408
2. *See* PLEADING, 1.

BARON AND FEME.

1. Husband and wife being defendants, the latter, after obtaining an order to answer separately, is entitled to all the orders for time to answer, and is not bound by any previous order obtained by her husband for that purpose on behalf of himself and her. [*Jackson v. Haworth.*] - 161
2. Husband and wife being defendants, the husband, without obtaining an order for the wife to answer separately, puts in a separate answer stating that his wife did not live with him and therefore he had no influence over her, and being taken into custody on an attachment for want of her answer, the Court ordered him to be discharged, and the wife to answer separately, and indemnify her husband in respect of costs. [*Garcy v. Whittingham.*] 163
3. Where husband and wife are defendants, and the husband is abroad, the plaintiff may obtain an order that the wife shall answer separately; but whether either the plaintiff or the husband can obtain this order without notice to the wife, and whether the husband can put in a separate answer before any such order is made? *Qu.* - - - 163
4. Husband and wife being defendants, and the husband being abroad, the wife alone was served with a subpoena, and an attachment was directed against her for want of appearance. [*Bushell v. Bushell.*] 164
5. Where a married woman having a separate interest joins as a plaintiff or co-defendant with her husband, instead of suing by her next friend, or answering separately, it is to be considered as the suit or defence of the husband alone, and will not prejudice a future claim by the wife. [*Hughes v. Evans.*] - 185
6. A divorce obtained by a wife after her husband's bankruptcy, does not entitle her in equity to the whole of a fund bequeathed to her which came into possession after the bankruptcy, although no settlement was made upon her at her marriage, and her husband at that time received 1,500*l.* stock in her right. [*Green v. Otte.*] - - - 250
7. Testator devised a freehold estate to trustees, in trust, to pay the rents as the same should become due and payable, into the hands of his wife, and not otherwise, for her life, for her separate use; and directed that the receipts of his wife alone, for what should be actually paid into her own proper hands, should be good discharges to his trustees. Held, that the wife had power to alienate her life estate. [*Acton v. White.*] - - - - - 429
8. Articles of settlement of the chattels real of an infant, on her marriage, will bind her and her husband; and although no settlement be made pursuant to the articles, the wife is not entitled to any interest by survivorship. [*Trollope v. Linnton.*] - - - - - 477
9. See COSTS, 2.—PRACTICE, 19.—PROCEIN AMY, 1. 3.—SETTLEMENT, 1.

BIDDINGS.

1. Biddings will not be opened upon an advance of 350 *l.* upon 5,300 *l.* [*Garstone v. Edwards.*] - - 20
2. Two lots ordered to be re-sold in one, where the advance offered on the smaller lot was not sufficient to authorize the opening of the biddings for that lot separately. [*Brookfield v. Bradley.*] - - - 23
3. Where several lots have been purchased by the same person, and the biddings are ordered to be opened as to some of them which were first purchased, the purchaser will be allowed the option of opening the biddings as to the remainder. [*Price v. Price.*] - - - - - 386

BOND.

To a bill filed by an obligee of a joint and several bond for payment of his debt, all the obligors must be made parties. [*Bland v. Winter.*]

246

CHARITY.

1. The Attorney General is a necessary party to all suits for charitable funds, except where a legacy is given to the officer of an established institution, as part of its general funds. [*Wellbeloved v. Jones.*] - - 40
2. Where a legacy is given for permanent charitable purposes, to persons having no corporate character, the Court will not, without a reference to the Master, allow the fund to be paid over to those persons, even

where they are entrusted by the testator with a management of the fund. - - - - - 40

3. Where a charity information is filed under 59 Geo. III. c. 91, without a relator, the Court has jurisdiction to order the defendant to pay the Attorney General his costs. [*Attorney General v. Ashburnham.*] - - - - - 394
4. See TRUST, 2.

CLERK IN COURT.

See PRACTICE, 25-

COMMISSION TO EXAMINE WITNESSES.

1. A bill for a commission to examine witnesses abroad must allege that an action has been brought. [*Angell v. Angell.*] - - - - - 83
2. See COSTS, 3.—PRACTICE, 7.

COMPENSATION.

See VENDOR AND PURCHASER, 2.

COMPROMISE.

The court cannot inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made. [*Naylor v. Wynch.*] - - - - - 555

CONDITION.

1. Where a legacy was given on condition of the legatee marrying with the consent in writing of the executors, and he afterwards married with

their approbation, but they did not express their consent in the manner required by the will: Held, that the legatee was entitled to his legacy, and that the consent of one of the executors who had not acted was not necessary. [*Worthington v. Evans.*]

165

2. See LEGACY, 1.—WILL, 5.

CONSTRUCTION.

1. Legacy to first and second cousins includes first cousins twice removed. [*Silcox v. Bell.*] - - - - 301
2. Settlement of a sum of money upon trust to be transferred to the surviving parent for the benefit of him or her, and any child or children of the marriage: Held, upon construction of the whole instrument, that the surviving parent took for life, with remainder to the children. [*Chambers v. Atkins.*] - - - 382
3. P. B. on his daughter's marriage, settled a sum of money on her and her husband; and their issue; and, after reciting that he had agreed to make a further provision for his daughter equal to his other younger children, covenanted to settle, by his will or otherwise, on the husband and wife and their issue, as great a share of his property as he should by his will or otherwise provide for any of his other younger children, to take effect on the death of the survivor of himself and his wife; and, if he died intestate, or omitted to make such provision, that his executors should pay to the

trustees as great a share of his property as his younger children should, in that event, become entitled to. Held, that the trustees had no claim upon the executors for advancements by the settlor to his other younger children in his lifetime, but only for a provision equal to that which the other children became entitled to at his death. [*Willis v. Black.*]

525

4. See DEED, 2, 3.—LEGACY, 2, 3.—WILL, 1. 7. 16, 17, 18, 19, 20.

CONTEMPT.

1. A defendant, in order to clear his contempt, must not only tender the costs; but, if they are refused, must also obtain an order for discharging his contempt. [*Green v. Thomson.*] - - - - - 121
2. Where a defendant is in contempt for want of an answer, and afterwards files it, if the plaintiff acts on the answer he waves the contempt, and the defendant need not obtain an order to discharge it. [*Hoskins v. Lloyd.*] - - - 393
3. See PRACTICE, 8, 9.

COPYHOLDS.

The ultimate limitation on a surrender of copyholds in default of appointment being to the two first named executors or administrators of the surrenderor, and the custom of the manor not admitting tenants to any larger estate than to two for their joint-lives and the life of the sur-

vivor, these executors or administrators are not trustees for the customary heir. Whether the administrators shall hold for their own benefit, or as trustees for the next of kin, *qu.* [*Wellman v. Bowring.*] - 24

CORPORATION.

If a regular corporate resolution has been passed for granting an interest in the corporate property, and, upon the faith of it, expenditure has been incurred, the Court will compel the corporation to make a legal grant in pursuance of the resolution, although it is not under the corporate seal. *Semble.* [*Marshall v. Corporation of Queenborough.*] - - 520

COSTS.

1. Where the subject of a suit has been disposed of out of Court, the Court will not hear the cause, merely for the purpose of disposing of the costs. [*Roberts v. Roberts.*] - 39
2. The separate property of a married woman in the hands of the Court is liable to the costs of a suit instituted by her touching that property. [*Barlee v. Barlee.*] - - - 100
3. On demurrer allowed to a bill for a commission to examine witnesses *de bene esse*, the plaintiff having, on an *ex parte* application, obtained an order to examine the witnesses, was ordered to pay to the defendant, besides the usual costs of the demurrer, the costs of the depositions, but not of those taken on cross examination. [*Dew v. Clarke.*] - - - 108

4. A legatee, who filed a bill for his legacy with notice of a prior suit for administering the assets, and the executors who answered the bill instead of moving to stay proceeding in the suit, were refused their costs. [*Packwood v. Maddison.*] 232
5. The court will not direct the costs of a suit and of an action between the same parties to be set off against each other. [*Wright v. Mudie.*] 266
6. The party making a successful motion is entitled to his costs as costs in the cause; but the party opposing it is not entitled to his costs as costs in the cause. [*Memorandum.*] 357
7. The party making a motion, which fails, is not entitled to his costs as costs in the cause; but the party opposing it is entitled to his costs as costs in the cause. - - - 357
8. Where a motion is made by one party and not opposed by the other, the costs of both parties are costs in the cause. - - - - - 357
9. Where a charity information is filed under 59 Geo. III. c. 91, without a relator, the Court has jurisdiction to order the defendant to pay the Attorney General his costs. [*Attorney General v. Earl of Ashburnham.*] - - - - - 394
10. Where a bill had been amended three times, and the two last amendments were made necessary by the negligence or error of the plaintiffs, the defendant was allowed extra costs for those amendments. [*Watts v. Manning.*] - - - - - 421

11. In a suit between the heir and the residuary legatee of the produce of real estate respecting a sum part of such produce, the costs were ordered to be borne proportionably by that sum and the residue. [*Jones v. Mitchell.*] - - - - - 290
12. The plaintiff in an interpleading suit is entitled to be paid his costs out of the fund. [*Campbell v. Solomons.*] - - - - - 462
13. The Court has no jurisdiction to order a solicitor's bill to be taxed on the application of the solicitor himself. [*Sayers v. Walond.*] - 97
14. See CONTEMPT, 1.—PROCEIN AMY, 1. — SOLICITOR AND CLIENT, 1.

COVENANT.

1. Where one is in possession of title deeds relating to his own lands, as well as to the lands of another person who has no covenant for the production of the title deeds, whether such other person has a general right in equity to compel the production of the deeds? *Qu.* [*Barclay v. Raine.*] - - - 449
2. A covenant to produce title deeds runs with the land for the benefit of purchasers. - - - - - 449

DEBTOR AND CREDITOR.

1. A devisee has a right to retain a debt due to himself or to his trustee out of the produce of the estate devised to him. [*Loomes v. Stotherd.*]

458

2. Where one of the plaintiffs in a creditor's suit dies after a decree, his personal representative has a right to revive. *Qu.* If before decree. [*Burney v. Morgan.*] - 358
3. A creditor cannot sue on behalf of himself and others, who have no common interest with him. - 358
4. The personal representative may retain for his own debt, notwithstanding a decree has been made in a suit by the other creditors for the administration of the assets, and notwithstanding the assets out of which he seeks to retain his debt came to his hands after the decree. [*Nunn v. Barlow.*] - - - 588
5. Where a creditor takes from his debtor an assignment of a debt due from a third person as a security for his demand, and, by his wilful default, the debt becomes irrecoverable, he must bear the loss. [*Williams v. Price.*] - - - - 581

DECREE.

1. Where a decree is made upon a bill taken *pro confesso*, the Court, whether the defendant has or has not appeared, pronounces an absolute decree in the first instance, and does not give the defendant a day to show cause. [*Landon v. Ready.*] - - - - - 44
2. Defendant submitting to the same decree as the plaintiff, according to the case made by the bill, would be entitled to at the hearing, may at

any time stay all further proceedings in the cause. [*Præd v. Hull.*]

331

3. See ASSETS, 1. 3.—PRACTICE, 16, 17.

DEED.

1. A married man having lived in adultery with a woman, and had children by her, executes a deed providing for her and the children in case of his death, and deposits it in the hands of his attorney, but afterwards procures possession of it himself: Held that the woman and her children can maintain a bill to compel him to deliver up this deed. [*Kaye v. Moore.*] - - - 61
2. The construction of a written instrument is the same in equity as at law. [*Ball v. Storie.*] - 210
3. A court of Equity will reform an instrument, which, by the mistake of the drawer, admits of a construction inconsistent with the true agreement of the parties, although the party seeking to reform it himself drew the instrument. [*Ball v. Storie.*] - - - 210
4. See CONSTRUCTION, 2, 3.—COVENANT.—PETITION.—PRACTICE, 25.—SETTLEMENT, 2.—SOLICITOR AND CLIENT, 3.

DEFENDANT.

1. A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on

putting in his fourth answer. [*Bel-four v. Farguharson.*] - - - 72

2. A defendant is not a party seeking the aid of the Court, and therefore is not entitled to apply for an interlocutory order for his own relief or security, as to the subject matter of the suit, unless the object of his motion may be imposed as a condition on an order applied for by the plaintiff. [*Wynne v. Griffith.*]

147

3. See CONTENT, 1, 2.

DEMURRER.

1. A defendant who has pleaded to a bill cannot demur *ore tenus* to it on his plea being overruled; because there is no demurrer on the record. [*Hook v. Dorman.*] - - - 327
2. See TESTIMONY, (BILL TO PERPETUATE,) 1.—COMMISSION TO EXAMINE WITNESSES.—JURISDICTION, 5.—MULTIFARIOUSNESS, 1, 2, 3.—PLEADING, 9. 12.—PRACTICE, 40.

DEPOSITIONS.

- See COSTS, 3.—TESTIMONY (BILL TO PERPETUATE), 2.

DESCENT.

1. Where an infant died seized of an equitable estate descended *ex parte materna*, his incapacity to call for a conveyance of the legal estate, (by which the course of the descent might have been broken,) is not a

sufficient reason to induce the Court to consider the case as if such a conveyance had actually been made; it not being according to the terms of the trust any part of the express duty of the trustees to execute such a conveyance. [*Langley v. Sneyd.*]

45

2. Where a person seised of an estate by descent *ex parte maternâ* dies without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor can inherit, however nearly related to the *propositus*, *ex parte maternâ*. [*Hawkins v. Skewen.*] - - - 257

DISCOVERY.

Prima facie discovery is incidental to relief. [*Angell v. Angell.*] - 83

DONATIO MORTIS CAUSA.

A mortgage or a bond given as a collateral security for money due on mortgage, cannot be made the subject of a *donatio mortis causâ*. [*Duffield v. Elwes.*] - - - - - 239

DOWER.

1. Testator devised gavelkind lands to his wife and two other persons in trust, as to one moiety, for his wife during her widowhood, and as to the other moiety, for his children. Held, that the wife must elect between her dower and the provision under the will. [*Roberts v. Smith.*]

513

2. Widow held to be barred of her dower in equity by a rent-charge granted in trust for her by way of jointure by the marriage settlement, to which her father was a party, although she was an infant at the time of the marriage, and the rent-charge failed by defect of title in the husband, and was afterwards confirmed by deed and recovery during the coverture; which, though they proved a valid confirmation, might have been defeated if there had been a son of the marriage. [*Corbet v. Corbet.*] - - - - 612

3. Wife evicted of jointure is by stat. 27 Hen. VIII, c. 10, s. 7, entitled to dower only *pro tanto*. [*Corbet v. Corbet.*] - - - - - 620

4. Grant of a rent-charge out of particular lands to an infant, in consideration of marriage, for her jointure, though the grantor be afterwards evicted, being in equity a general agreement to grant a rent-charge of that amount out of some lands, will bind the infant if her parent or guardian assented to it. 620

ELECTION.

See DOWER, 1.

EQUITY OF REDEMPTION.

1. Husband and wife being jointly entitled to an equity of redemption in fee, convey it by deed, without a fine, to the mortgagee; the wife survives: she or her heir may redeem at any time within twenty

years from the husband's death.

[*Price v. Copner.*] - - - 347

2. Where the purchaser of an equity of redemption had the legal estate conveyed to him by a deed dated the 24th of August 1796, in which it was recited, that the purchaser had sometime since paid to the mortgagee the money due on his mortgage, and a bill to redeem was filed on the 29th of January 1816: Held, that the recital was an acknowledgment of the mortgage till within twenty years from the filing of the bill. [*Price v. Copner.*] 347
3. If a mortgagee enters in the lifetime of the tenant for life of the mortgaged estate, the remainderman will be barred of his right to redeem after twenty years from such entry. [*Harrison v. Hollins.*] 471

EXAMINATION.

1. The examination of a sequestrator in the Master's office does not require the signature of counsel. [*Keene v. Price.*] - - - 98
2. If after a defendant has put in his examination to the usual interrogatories before the Master, the plaintiff discovers that the defendant has received sums not mentioned in his examination, the Master is at liberty to receive a new state of facts and further interrogatories founded upon them, without the order of the court. [*Sidden v. Foster.*] - 335
3. See WITNESS, 2.

EXCEPTIONS.

1. Exceptions having been allowed to the answer, and the bill having been amended, and the usual order obtained that defendant should answer the amendments and exceptions at the same time, defendant put in a second answer. The plaintiff then took exceptions to the second answer, and intitled them, "Exceptions to the further answer to the original bill, and to the answer to the amended bill." The exceptions were held to be irregularly intitled, and were ordered to be taken off the file, because new exceptions cannot be taken to the further answer to the original bill, but, if that answer be considered insufficient, it must be referred back to the Master upon the old exceptions. [*Williams v. Davies.*] - - - - - 426

EXECUTOR.

1. Testator named two persons to be his executors, and bequeathed to them 50*l.* each, upon condition of their taking upon themselves a certain trust, and afterwards used these words: "I give to my cousin *T. K.* 50 *l.* who I appoint joint executor;" and the testator also gave to *T. K.*'s sisters legacies of 50 *l.* each: Held, that the legacy to *T. K.* was not annexed to the office of executor, and that he was entitled to it although he had declined to act in the trusts of the will. [*Dix v. Reed.*]

2. After a decree for the administration of assets, the executor pleaded a false plea to an action by a creditor of the testator, in order to apply for an injunction to restrain the action; the Court granted the injunction, and held that the creditor was not entitled to judgment against the executor *de bonis propriis*. [*Fielden v. Fielden*.] - - - - - 255

EXHIBITS.

See PRACTICE, 25.

FOREIGN COURT.

See JURISDICTION, 1, 2, 4.

FRIENDLY SOCIETY.

See STOCK.

GUARDIAN AND WARD.

1. Where a guardian, after his ward attains full age, continues to manage the property at the request of the ward, and before the accounts of his receipts and payments during the minority are settled, it is in effect a continuance of the guardianship as to the property; and he must account on the same principle as if they were transactions during the minority. Under these circumstances an injunction was granted, on terms, to restrain the guardian from proceeding in an action to recover the balance claimed by him on account of the transactions after his ward came of age. [*Mellish v. Mellish*.] - - - - - 138

2. A solicitor, who advanced money to an infant for the subsistence of himself and his family, and acted as his confidential adviser, is in the nature of a guardian to him; and an account settled between them within a month after the infant came of age, and without the latter having any assistance, was opened, notwithstanding the vouchers had been delivered up. [*Revett v. Harvey*.]

502

HEIR.

1. *Qu.* Whether there can be a decree to marshal the assets where the heir at law is an infant? [*Pott v. Gallini*.]

209

2. See TRUST, 1.—WILL, 3.

ILLEGITIMATE CHILD.

- J. S.* having contracted a marriage, which was void *ab initio*, and having one son of that marriage, made his will, and gave the residue of his personal estate to all his children by his reputed wife. Held, that the son, being born at the date of the will, was entitled. [*Bayley v. Snelham*.] - - - - - 78

IMPERTINENCE.

- A* defendant, in answer to an allegation in the bill that some cotton was of inferior quality, said, that from certain affidavits and certificates made by experienced persons, he believed the cotton to be of a superior quality, and set forth the

affidavits and certificates in a schedule in *hoc verba*. Held, that the schedule was not impertinent. [*Parker v. Fairlie*.] - - - 295

IMPLICATION.

Devise of lands to trustees, upon trust to pay one moiety of the rents to devisor's wife for her life, and the other to his only son; and after his wife's death to convey to his son in fee; but if the son died without issue in the wife's life, to convey to devisor's nephew in fee. The son died without issue in the wife's life. She is not entitled for life, by implication, to the moiety devised to the son. [*Aspinall v. Petvin*.] 544

INFANT.

1. *Qu.* Whether there can be a decree to marshal the assets where the heir at law is an infant? [*Pott v. Galini*.] - - - - - 209
2. See GUARDIAN AND WARD, 2.—TRUST, 1.

INJUNCTION.

1. All the partners in a publication, except one, being also partners in a rival publication, an injunction to restrain the using of the effects of the former partnership to assist the latter, in consideration of an annual sum, was refused, where there had been an agreement permitting the use on those terms, which had been acted on for many years. But the injunction was granted to restrain

the use of partnership effects not included in the agreement. [*Glassington v. Thwaites*.] - - - - 124

2. A temptation to the abuse of partnership property is not sufficient to induce the Court to interfere by injunction. - - - - - 124
3. After a decree for the administration of assets, the executor pleaded a false plea to an action brought against him by a creditor of the testator, in order that he might have an opportunity to apply for an injunction to restrain the action; the Court granted the injunction, and held that the creditor was not entitled to a judgment against the executor *de bonis propriis*. [*Fielden v. Fielden*.] - - - - - 255
4. An injunction may be obtained upon motion to restrain a purchaser under a decree, not a party to the cause, who has not paid his purchase-money, from committing waste on the property purchased. [*Casamajor v. Strode*.] - - - - 381
5. An injunction to restrain the setting up of an outstanding term in bar of an ejectment will not be granted upon motion. [*Barney v. Lockett. Northey v. Pearce*.] - - 419, 420
6. Where an injunction has been granted on merits, a motion to amend without prejudice to the injunction, is a motion of course; but where it has issued on account of delay, notice of the motion must be given, and the proposed amendments must be stated. [*Pratt v. Archer*.] - - - - - 433

7. An injunction granted by the Court of Chancery in Ireland to restrain proceedings at law there, is not sufficient to obtain an injunction here to restrain proceedings in K. B. in respect of the same matters. [*Ball v. Storie.*] - - - - - 210
8. If a person against whom a verdict has been obtained, afterwards acquires a demand against the party who obtained it, to a greater amount, he is not entitled to an injunction to restrain proceedings on the verdict. [*Whyte v. O'Brien.*] - - 551.
9. See ANSWER, 2.—GUARDIAN AND WARD, 1.—JURISDICTION, 1. 4.—PRACTICE, 8, 9. 12. 22. 41.

INTEREST.

See VENDOR AND PURCHASER, 1. 4.

INTERPLEADER.

The plaintiff in an interpleading suit is entitled to be paid his costs out of the fund. [*Campbell v. Solomans.*] - - - - - 462

ISSUE AT LAW. See PRACTICE, 31.

JOINTURE. See DOWER, 2, 3, 4.

JURISDICTION.

1. Injunction (on terms) granted to restrain mortgagees of a West India estate from proceeding on a bill of foreclosure in the Colonial Court filed after a decree made in this Court, which directed an inquiry to

- ascertain the amount of the mortgage debt on a bill to redeem, all parties being in this country. [*Beckford v. Kemble.*] - - - - - 7
2. Qn. Whether the mortgagee of a Jamaica estate on a bill of foreclosure in this Court is entitled to a decree for sale of the estate according to the law of the colony. - - 7
3. The Vice-Chancellor has no jurisdiction under the act of 53 Geo. 3. c. 24, to alter, vary or discharge any order made by the Master of the Rolls. [*Whitehouse v. Hickman.*] - - - - - 104
4. An injunction granted by the Court of Chancery in Ireland to restrain proceedings at law in that country on an interlocutory application, is not of itself a sufficient ground to obtain an injunction in this Court to restrain proceedings in an action in the King's Bench here in respect of the same matters. [*Ball v. Storie.*] - - - - - 210
5. A general demurrer to a bill by the assignees of a bankrupt to restrain an action by him to try the validity of the commission, allowed. [*Kirkpatrick and another v. Dennett.*] 408
6. The Court has no jurisdiction to order a solicitor's bill to be taxed on the application of the solicitor himself. [*Sayers v. Walond.*] - 97

LEASE.

1. Where by act of parliament a corporation was empowered to purchase subsisting interests in certain hereditaments, and it was directed that

the purchase-money should be re-invested in land, and in the mean time be laid out in the funds, and the dividends paid to the persons entitled to the rents: Held, that neither persons who had taken leases after the passing of the act, nor the lessors in respect of their right to renew, were entitled to any compensation out of the purchase-money. [*Bishop of London's Case.*] - 268

LEGACY.

1. Where a legacy was given on condition of the legatee marrying with the consent in writing of the executor, and he afterwards married with their approbation, but it was not expressed in writing: Held, that the legatee was entitled to his legacy, and that the consent of an executor who had not acted was not necessary. [*Worthington v. Evans.*] - 165

2. A bequest of household furniture and other household effects in a dwelling-house and premises, comprises all property kept therein, either for use or ornament. [*Cole v. Fitzgerald.*] - - - - 189

3. Testator named two persons to be his executors, and bequeathed to them 50*l.* each, upon condition of their taking upon themselves a certain trust, and afterwards used these words: "I give to my cousin T. K. 50*l.* whom I appoint joint executor;" and the testator also gave to T. K.'s sisters, legacies of 50*l.* each: Held, that the legacy to T. K. was not annexed to the office

of executor, and that he was entitled to it although he had declined to act in the trusts of the will. [*Dix v. Reed.*] - - - - - 237

4. Where a legacy is given upon a contingency, and a suit is instituted for the administration of the testator's estate, the Court does not direct a sum of stock belonging to the estate to be appropriated to pay the legacy when the contingency happens; but directs the whole residue to be paid over to the residuary legatee, on his giving security to pay the legacy when due. [*Webber v. Webber.*] - - - - - 311
5. See, WILL, 5. 7. 9. 12. 14. 18.—
ILLEGITIMATE CHILD.—POST-
HUMOUS CHILD.

LEGITIMACY.

1. A child born of a married woman, whose husband is within the four seas, is always presumed to be legitimate, unless there is evidence affording irresistible presumption that sexual intercourse did not take place between them at any time when in the course of nature the husband might be the father of a child. [*Head v. Head.*] - - 150
- And see *Banbury Peerage Case*, 153

LIMITATIONS, STATUTE OF.

1. If a tenant for life has rendered accounts to the remainder-man, of timber cut by him during a period of more than six years before a bill is filed against him for an account

of such timber, and of the value of it, the statute of limitations cannot be pleaded to the bill; for though, if the remainder-man had brought an action of trover, the tenant for life might, notwithstanding the rendering of the accounts, have pleaded the statute, he could not have done so if the remainder-man had brought an action of assumpsit. [*Hony v. Honey.*] - - - - - 568

2. If a mortgagee enters in the lifetime of the tenant for life of the mortgaged estate, the remainder-man will be barred of his right to redeem after twenty years from such entry. [*Harrison v. Hollins.*] 471
3. See EQUITY OF REDEMPTION, 1, 2.

LUNATIC.

After a decree in a suit in which a lunatic and his committee were defendants, the committee died and a new one was appointed; ordered, upon motion, that the new committee should be named as such in future proceedings in the cause. [*Lyon v. Mercer.*] - - - - - 356

MISTAKE.

A court of equity will reform an instrument which by the mistake of the drawer admits of a construction inconsistent with the true agreement of the parties, although the party seeking to reform it himself drew the instrument. [*Ball v. Storie.*] 210

MONEY (PAYMENT OF, INTO COURT.)

1. Money admitted by an executor to be in the hands of his partner is in his own hands for the purpose of being paid into Court. [*Johnson v. Aston.*] - - - - - 73
2. The Court will not compel a vendor to pay the deposit-money into Court, though he retains possession of the estate, if the delay in the completion of the contract is occasioned by the purchaser. [*Wynne v. Griffith.*] 147

MORTGAGE.

1. The statute 7 Geo. II. c. 20, as to foreclosure, gives no new power to courts of Equity. [*Praed v. Hull.*] 331
2. Where the purchaser of an Equity of redemption had the legal estate conveyed to him by a deed dated the 24th of August 1796, in which it was recited that the purchaser had some time since paid to the mortgagee the money due on his mortgage, and a bill to redeem was filed on the 29th of January 1816; held, that the recital was an acknowledgment of the mortgage title, within twenty years from the filing of the bill. [*Price v. Copner.*] - - 347
3. See EQUITY OF REDEMPTION, 1.
4. Where, in a foreclosure suit, exceptions are taken to the Master's report, and the time appointed for payment of the mortgage money is

likely to elapse before the exceptions are heard, the defendant should apply to the Court, upon the exceptions being filed, to have the time enlarged until the exceptions are disposed of. [*Renvoize v. Cooper.*] - - 364

5. If a third incumbrancer, having constructive notice of the second mortgage, fails to keep the first security on foot for his protection, he is not entitled to stand in the place of the first mortgagee against the second. [*Parry v. Wright.*] - 369

6. If a mortgagee enters in the lifetime of the tenant for life of the mortgaged estate, the remainderman will be barred of his right to redeem after twenty years from such entry. [*Harrison v. Hollins.*] 471

7. See PLEADING, 9, 10;—JURISDICTION, 1, 2.

MULTIFARIOUSNESS.

1. A married man, after having lived in adultery with a woman and had children by her, executes a deed providing for her and the children in case of his death, and deposits it in the hands of his attorney, but afterwards procures possession of it himself: Held, on demurrer, that the woman and her children can maintain a bill to compel him to deliver up this deed, and that the bill was not multifarious, though it also sought performance of an agreement to pay an annuity to the woman, which could not be decreed in equity. [*Knye v. Moore.*] - - - - 61

2. Two distinct matters cannot be joined in the same suit, where one requires that the depositions should not be published till the hearing of the cause, and the other requires an immediate publication of the same depositions. [*Dew v. Clarke.*] 108

3. Where under a will the residuary legatees are also appointees of a share of another testator's estate; a bill filed by them for an account of both estates is not multifarious. [*Turner v. Robinson.*] - - - 313

NUISANCE.

See SPECIFIC PERFORMANCE, 1.

OUTLAWRY.

1. A plea of outlawry, to which neither an office copy of the record of outlawry, nor of the *capias utlagatum*, was annexed, but only a certificate from the clerk of the outlawries, was held to be bad; but leave was given to amend it, because the defect was caused by a mistake of the clerk of the outlawries, and not of the defendant, and did not affect the substance of the plea. [*Waters v. Mayhew.*] - - - - 220
2. A defendant, against whom an attachment was issued for want of an answer, may file a plea of outlawry. [*Waters v. Chambers.*] - - 225

PARTIES.

1. A person with whom a deed had been deposited, but out of whose

- hands the deed was afterwards taken by the person who had deposited it, need not be made a party to a bill filed against the other person by parties claiming under the deed, where no breach of trust is alleged against him. [*Kaye v. Moore.*] 61
2. The general rule is, that appointees under the will of a feme covert are necessary parties to a suit concerning the fund which is the subject of appointment. [*Court v. Jeffery.*] 105
3. Where appointees are very numerous, and the bill is filed by some of them, on behalf of themselves and others, the Court will dispense with the general rule, which requires all appointees to be parties. [*Manning v. Theisiger.*] - - - - 106
4. Where the claim of the next of kin is raised on the record, and one person is in that character a party, other persons found by the Master to be next of kin may be heard by the Court, though not parties; but where the claim is not raised on the record, and none of the next of kin are in that character parties to the cause, there must be a supplemental bill to bring them before the Court. [*Waite v. Temple.*] - - - 319
5. To a bill filed by an obligee of a joint and several bond for payment of his debt, all the obligors must be made parties. [*Bland v. Winter.*] 246
6. A share of an intestate's personal estate was assigned to trustees, in trust for the appointees of husband and wife; and in default of appointment, in trust for them and the survivor. Husband and wife sold and assigned this share. The husband died first, and then the wife, having bequeathed all her personal estate to the plaintiff. The husband's personal representative is not a necessary party to a bill by the legatee to set aside the sale. [*Dowlin v. Macdougall and Hunter.*] - - 367
7. See CHARITY, 1.

PARTNERSHIP.

1. All the partners in a publication, except one, being also partners in a rival publication, an injunction to restrain the using of the effects of the former partnership to assist the latter, in consideration of an annual sum, was refused, where there had been an agreement permitting the use on those terms, which had been acted on for many years. But the injunction was granted to restrain the use of partnership effects, not included in the agreement. [*Glas-
sington v. Thwaites.*] - - - 124
2. A temptation to the abuse of partnership property is not sufficient to induce the Court to interfere by injunction - - - - - 124
3. If, upon a dissolution of partnership, it is agreed that certain articles of the partnership stock shall become the exclusive property of one of the partners, and that a certain fund shall be appropriated to the payment of the debts, and that fund afterwards proves insufficient for the

purpose, the other partner has no lien on those articles in respect of such deficiency. [*Lingen v. Simpson.*] - - - - - 600

4. A Court of Equity will enforce an agreement made upon a dissolution of partnership, that a particular book used in the trade should become the exclusive property of one of the partners, and that a copy of it should be delivered to the other. - - 600

PETITION.

1. A person who is not a party to a cause may present a petition in the cause to have deeds, which had been brought into the Master's office under the decree, delivered out to him. [*Marriott v. White.*] - - - 17

PLEA.

1. A plea of outlawry, to which neither an office copy of the record of outlawry, nor of the *capias utlagatum*, was annexed, but only a certificate from the clerk of the outlawries, was held to be bad; but leave was given to amend it, because the defect was caused by a mistake of the clerk of the outlawries, and not of the defendant, and did not affect the substance of the plea. [*Waters v. Mayhew.*] - - - - - 220
2. A defendant, against whom an attachment was issued for want of an answer, may file a plea of outlawry. [*Waters v. Chambers.*] - - - 225
3. To a bill for the delivery of title-deeds, and for an injunction to

restrain the setting up of outstanding terms, to which no affidavit as to the title-deeds was annexed, the defendant pleaded that there were no outstanding terms. Plea overruled, because it ought to have been confined to so much of the bill as related to the outstanding terms, and because that part of the bill which related to the title-deeds ought to have been demurred to for want of the affidavit. [*Hook v. Dorman.*] - - - - - 227

4. A plea of bankruptcy is good, notwithstanding the commission issued after the filing of the bill. [*Turner v. Robinson.*] - - - - - 3
5. Matters which arise after the filing of the bill may be pleaded, by analogy to the rule at law. - - 3
6. Plea to all the relief, and all the discovery, except certain interrogatories, accompanied with an answer to these interrogatories, which did not go to any material point, overruled. *Aliter*, if the answer had been to matter which would have repelled the defence by plea. [*James v. Sadgrove.*] - - - - - 4
7. Where there is matter charged by the bill which goes to repel the defence by plea, the plea must be supported by an answer to that matter. - - - - - 6
8. To a plea of outlawry, either an office copy of the record of the outlawry, or of the *capias utlagatum*, must be annexed. [*Waters v. Mayhew.*] - - - - - 220

PLEADING.

1. To a bill filed by an obligee of a joint and several bond for payment of his debt, all the obligors must be made parties. [*Bland v. Winter.*] 246
2. Where, under a will, the residuary legatees are also appointees of a share of another testator's estate, a bill filed by them for an account of both estates is not multifarious. [*Turner v. Robinson.*] - - - 313
3. A creditor cannot sue on behalf of himself and others who have no common interest with him. [*Burney v. Morgan.*] - - - - - 358
4. A person entitled to part only of a sum of money due on mortgage cannot file a bill for foreclosure of the same part of the mortgaged estate. [*Palmer v. E. of Carlisle.*] 423
5. There can be no redemption or foreclosure, unless the parties entitled to the whole of the mortgage money are before the Court. - 423
6. To a bill to set aside an award charging fraud and corruption in the arbitrator, the defendant answered as to the fraud and corruption, and demurred to the rest of the bill: held that the answer overruled the demurrer. [*Dawson v. Sadler.*] - - - - - 537
7. If a bill for the specific performance of an agreement states that the agreement was in writing, signature will be presumed. [*Rist v. Hobson.*] - - - - - 543

8. See ANSWER, 6.—COMMISSION, 1.—MULTIFARIOUSNESS, 1, 2, 3.—TESTIMONY, (BILL TO PERPETUATE), 1.

PORTIONS.

1. Where real estates were devised in strict settlement, subject to a trust for raising portions for younger children during the minority of the tenant for life out of the rents and profits, or by sale or mortgage: held that certain funds which had arisen from the rents during the minority of the tenant for life, were applicable to the payment of the portions, and that the deficiency only could be raised by sale or mortgage. [*Warter v. Hutchinson.*] 276
2. Where a parent, who is tenant for life of a settled estate, with remainder to a trustee for a term of 500 years, upon trust to raise portions for younger children, has power to appoint the portions by deed or will, they cannot be raised in the parent's lifetime; and the whole sum cannot be raised until they have all attained twenty-one. [*Wyn-ter v. Bold.*] - - - - - 507

POSTHUMOUS CHILD.

1. Bequest in trust for all the children of the testatrix's nephew R. born in the lifetime of the testatrix, includes a child of which the wife of R. was enceinte at the time of the testatrix's

death, though not born for several months afterwards. [*Trower v. Butts.*] - - - - - 181

POWER.

1. Settlement of two estates in remainder on *A. W. T.* for life, with remainder to his sons in strict settlement, and remainder over to *M.* with power to tenants for life in possession to charge the estates with a jointure of 400 *l.* and power to the settlor to revoke the uses of the settlement as to one of the estates, and to appoint new uses. By a subsequent deed the settlor exercises the power of revocation as to the remainder to *M.*: and in lieu thereof, appoints that estate to *S.* and repeats several of the powers contained in the first settlement, and gave power to *A. W. T.* and *S.* to charge the estate with 400 *l.* by way of jointure. *A. W. T.* by separate deeds executes both powers of jointuring. Held, on a bill by his widow for both jointures, that *A. W. T.* had no new power to jointure under the second settlement. [*Wigsell v. Smith.*] - - - - - 321
2. By articles for settlement of the wife's real and leasehold estates, the husband had power to appoint her estates to the children of the marriage, for such estates, and in such parts, and in such manner and form as he should by deed or will appoint: and by other articles of the same date, for the settlement of his own real es-

tates, he had an absolute power of appointment over them by deed or will, in default of issue of the marriage. There being several children of the marriage, and no settlement pursuant to the articles, the husband, (who died in the lifetime of the wife,) by his will, recited the articles for the settlement of his own estates, and confirmed them, and recited the power of appointment in them at length, mentioning it as a power intended to be exercised by that his will: and thereby, in exercise of that power, and all other powers, appointed his own real estates, and all other real estates over which he had power, to trustees for a term of 500 years, upon trust, to raise portions for his younger children, making no mention, in any part of his will, of the articles for settlement of his wife's estate; but directing that all persons taking any benefit under his will should be bound by the doctrine of election to give effect to every disposition contained in it: held, that the will operated as an appointment of the wife's real estates; and that the creation of the term of 500 years was a good execution of a power to appoint for such estates as the appointor should think fit; and that the words 'in such manner and form' authorized him to give equitable interests to the children. [*Trollope v. Linton.*] - - - - - 477

PRACTICE.

1. A person who is not a party to a cause, may present a petition in the cause, to have deeds belonging to him, which had been brought into the Master's office under the usual direction in the decree, delivered out to him. [*Marriott v. White.*] 17
2. Biddings will not be opened, even in a creditor's suit, upon an advance of 300*l.* upon 5,300*l.* [*Garstone v. Edwards.*] - - - - - 20
3. An order having been obtained by plaintiff to take a demurrer off the file, it is irregular if the defendant file a plea and answer before the demurrer is actually taken off. [*Cust v. Boode.*] - - - - - 21
4. Where a decree is made upon a bill taken *pro confesso*, the Court, whether the defendant has or has not appeared, pronounces an absolute decree in the first instance, and does not give the defendant a day to show cause. [*Landon v. Ready.*] 44
5. A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on filing his fourth answer. [*Balfour v. Farquharson.*] - - - - - 72
6. If in the title of an order to dismiss a bill for want of prosecution, the plaintiff is called by a wrong christian name, a replication filed after the order is drawn up and served, will not be taken off the file. [*Verlander v. Codd.*] - - - - - 94
7. Commissions for the examination of witnesses abroad, returnable without delay, need not be returned within the same period as home commissions; viz. before the end of the term next after they were issued; but a reasonable time is allowed according to circumstances. [*Wake v. Franklin.*] - - - - - 95
8. To prevent either an attachment or an injunction, or a motion to extend the common injunction to stay trial, the answer must be filed on the evening before the seal day at the latest; and an answer filed on the seal day is too late, although the motion on account of the pressure of business could not be made until the following day. [*Whitehouse v. Hickman.*] - - - - - 102
9. A mistake as to the office hours, (even where the answer was sworn the day before, and was filed at the earliest possible moment on the seal day) is no ground of exception to the general rule, that in order to prevent an attachment, or an injunction, the answer must be filed the day before the seal day. [*Ibbotson v. Booth.*] - - - - - 103
10. Plaintiff having obtained an order to amend, and that defendant may answer exceptions and amendments at the same time, the defendant may immediately move that the amendments be made within ten days, or the order be discharged. [*Whitehouse v. Hickman.*] - - - - - 105
11. An attachment for want of an answer to an amended bill, cannot

- be obtained until the amendments have been entered in the six clerks book; and it makes no difference whether the original bill has or has not been answered. [*Adams v. Blackstock.*] - - - - - 118
12. On a motion for an injunction, affidavits filed before the answer may be read, where the plaintiff, by saving the notice of motion till a future day, enabled the defendant to file his answer before the motion was made. [*Glassington v. Thwaites.*] - - - - - 124
13. Where a defendant enters his appearance gratis, the time within which he must answer or sue out a commission, is to be calculated from the date of his actual appearance, and not from that at which the *subpoena* would have been served if he had waited till the regular service. [*Webster v. Threlfall.*] - 135
14. Where the draft of an amended bill is signed by the same counsel who signed the draft of the original bill, and no new engrossment is required, counsel's name need not be repeated on the engrossment. 135
15. Bill, amended by interlineation, ordered to be taken off the file for irregularity, neither the draft nor the engrossment of the amendments being signed by counsel, though there was no new engrossment of the bill. [*Pitt v. Macklew.*] - - - - 136
16. After a decree for the administration of assets in an amicable suit, a creditor having filed a bill praying for the usual accounts (which had been directed by the former decree, and also to have the assets marshalled, which was not prayed for or decreed in the first suit,) the Court made a second decree, directing the usual accounts and the assets to be marshalled, with liberty to the Master to use the accounts taken under the former decree. [*Pott v. Gallini.*] - - - - - 206
17. If the second suit had been merely for the same objects as the first, the decree in the first suit would have been a bar to it; and the Court, on motion before answer, would have ordered all proceedings in it to be stayed. - - - - - 206
18. Where the answer to a bill for specific performance raises any other objection except defects of title, on a motion to refer the title to the Master, the Court will not examine whether the other objection be frivolous or not. [*Withy v. Cottle. Gordon v. Ball.*] - - 174, 178
19. Husband and wife being defendants, the latter, after obtaining an order to answer separately, is entitled to all the orders for time to answer, and is not bound by any previous order obtained by her husband for that purpose, on behalf of himself and her. [*Jackson v. Haworth.*] - - - - - 161
20. A defendant against whom an attachment with proclamations has issued, may file a plea and answer if the writ has not been returned. [*Sanders v. Murney.*] - - 225

21. Where one of two or more plaintiffs dies before an answer is put in, the suit is abated, and the defendant cannot move that a supplemental bill be filed within a limited time, as in the case of a plaintiff becoming bankrupt. [*Adamson v. Hull.*] 249
See 1 *Turner's Reports*, 258.
22. An order to dissolve an injunction nisi, obtained after exceptions filed to the answer, is irregular. [*Williams v. Davis.*] - - - 262
23. The Master's certificate of disobedience to a decree directing deeds, papers, and writings to be produced before him, need not be filed within four days after it is signed: it is sufficient if it be filed before the four-day order is delivered out. [*Harris v. De Tastet.*] - - - - - 263
24. The Court will order a sequestration to issue against a defendant who is in contempt, for not putting in an examination to interrogatories before the Master. [*Lupton v. Hescott.*] - - - - - 274
25. The Court never orders a clerk in court, with whom exhibits have been deposited under the usual order, to deliver them up to any other person for the purpose of their being produced in court, or at the assizes, without the consent of all parties, and payment of the clerk in court's fees. [*Harris v. Bodenham.*] - 283
26. Defendant submitting to the same decree, as the plaintiff, according to the case made by the bill, would be entitled to at the hearing, may at any time stay all further proceedings in the cause. [*Praed v. Hull.*] 331
27. The principle of waiver applies to an irregular but not to an erroneous order. [*Leri v. Ward.*] - - 334
28. After a decree in a suit in which a lunatic and his committee were defendants, the committee died and a new one was appointed. Ordered, upon motion, that the new committee should be named as such in all future proceedings in the cause. [*Lyon v. Mercer.*] - - - - - 356
29. If after a defendant has put in his examination to the usual interrogatories before the Master, the plaintiff discovers that the defendant has received sums not mentioned in his examination, the Master is at liberty to receive a new state of facts, and further interrogatories founded upon them, without the order of the court. [*Sidden v. Forster.*] - - - 335
30. Where in a foreclosure suit exceptions are taken to the Master's report, and the time appointed for payment of the mortgage money is likely to elapse before the exceptions are heard, the defendant should apply to the Court, upon the exceptions being filed, to have the time enlarged, until the exceptions are disposed of. [*Renvoize v. Cooper.*] 364
31. Where a decree directs issues to try the validity of moduses, and the plaintiff wishes to have the issues tried in a different county from that in which the lands lie, an order for that purpose cannot be inserted

- in the decree, but must be obtained by petition. [*Sparke v. Ivatt.*] 366
32. The Court will not order copies of depositions taken to perpetuate the testimony of witnesses to be delivered out for the purpose of perfecting the title to an estate, even where the witnesses are dead. [*Teale v. Teale.*] - - - - - 385
33. Where a defendant is in contempt for want of an answer, and afterwards files it, if the plaintiff acts on the answer, he waves the contempt, and the defendant need not obtain an order to discharge it. [*Hoskins v. Lloyd.*] - - - - - 393
34. An injunction to restrain the setting up of outstanding terms in bar of an ejectment, will not be granted upon motion. [*Barney v. Luckett. Northey v. Pearce.*] - 419, 420
35. Where a bill had been amended three times, and the two last amendments were made necessary by the negligence or error of the plaintiffs, the defendant was allowed extra costs for those amendments. [*Watts v. Manning.*] - - - - - 421
36. Where an injunction has been granted on merits, a motion to amend without prejudice to the injunction, is a motion of course; but where it has issued on account of delay, notice of the motion must be given, and the proposed amendments must be stated. [*Pratt v. Archer.*] 433
37. A party who examines a witness is bound to keep him in town for forty-eight hours after his production at the seat of the adverse clerk in court, and, if cross interrogatories are left with the examiner within the forty-eight hours, the party must keep the witness in town till the cross examination is finished. [*Whittuck v. Lynght.*] - - 446
38. A cause may be regularly set down without consent in the vacation after the term in which publication passes. [*Partridge v. Cann.*] 466
39. There is no precise time beyond which witnesses cannot be discredited. Interrogatories in support of articles for that purpose may relate to particular facts not in issue in the cause, as well as to the credit of the witnesses generally. [*Piggott v. Croxhall.*] - - - - - 467
40. After a demurrer overruled, an order for time to answer merely can be obtained by a special application only. [*Trim v. Baker.*] - 469
41. An order to dissolve the common injunction *nisi* may be obtained, notwithstanding the defendant has excepted to the Master's report as to the sufficiency of the answer. [*Mc- rest v. Coster.*] - - - - - 486
42. Where, under an order made in a creditor's suit, a supplemental bill is filed by a creditor, not a party to the original suit, on behalf of himself and all other creditors, to have the benefit of the decree in that suit, the propriety of the order which authorized the creditor to file the supplemental bill cannot be questioned at the hearing of the supple-

mental cause. When leave is given to file such a bill, the plaintiff in it is entitled to the same decree to have the benefit of former proceedings, as the representatives of the original plaintiffs would have been entitled to on a bill of revivor. [*Houlditch v. Marquis of Donegall.*] - - 491

43. After a demurrer overruled, the defendant cannot plead to the bill without the leave of the Court. [*Rowley v. Eccles.*] - - - 511

44. See ACCOUNT, 1.—ANSWER, 3, 4, 5.—ASSETS, 1, 2.—BIDDINGS, 1, 2.—COSTS, 2, 3.—EXAMINATION, 1.—MONEY, PAYMENT OF, INTO COURT, 1, 2.—PLEA, 1, 2.—VENDOR AND PURCHASER, 4.—RESIDUE.

PROCHEIN AMY.

1. A married woman, being the plaintiff, and her prochein amy having died, it was ordered that she should name a new prochein amy within two months, or that the bill should be dismissed, and the costs paid out of the fund in court. [*Barlee v. Barlee.*] - - - - - 100

2. Where a new next friend is to be substituted, the Court refused to inquire into the circumstances of the proposed next friend, though it was suggested that he was in indigent circumstances. [*Davenport v. Davenport.*] - - - - - 101

3. Where the next friend of a *feme covert* had taken the benefit of the Insolvent Debtor's Act, but was detained in prison, and had obtained

an order upon the husband for payment of his groats after the answer was filed, and before any other proceeding was taken in the cause, a motion by one of the defendants that the next friend might be removed and another appointed, was refused, as being improper in form; but leave was given to apply to stay proceedings until the next friend should be changed, or security given for costs. [*Pennington v. Alvin.*] 264

RECEIVER.

This Court will appoint a receiver pending a suit in the Ecclesiastical Court to recall probate, on a case of strong presumption of fraud. [*Rutherford v. Douglas.*] - - - 111

RESIDUE.

1. Where a legacy is given upon a contingency, and a suit is instituted for the administration of the testator's estate, the Court does not direct a sum of stock belonging to the estate to be appropriated to pay the legacy when the contingency happens; but directs the whole residue to be paid over to the residuary legatee on his giving security to pay the legacy when due. [*Webber v. Webber.*] - - - - - 311

2. See ANNUITY, 3.

RESTS.

1. Where payments have been made by a vendee at different times on account of his purchase, all exceeding

the interest due at the times of such payments, and the decree in a suit by the vendor for a specific performance directs an account to be taken of what is due to the plaintiff for the principal and interest in respect of the purchase, rests are always made in taking the account. [*Griffith v. Heaton.*] - - - - - 271

RETAINER.

A devisee has a right to retain a debt due to himself or to his trustee out of the produce of the estate devised to him. [*Loomes v. Stotherd.*] 458

RIVER.

1. Every owner of land on the banks of a river has, *primâ facie*, an equal right to use the water, and cannot acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant or twenty years enjoyment, which is evidence of a grant. [*Wright v. Howard.*] 190

SET-OFF.

The Court will not direct the costs of a suit and of an action between the same parties to be set-off against each other. [*Wright v. Mudie.*] - 266

SETTLEMENT.

1. Upon a reference to the Master to approve of a proper settlement upon the wife, out of a fund accruing in her right, which was claimed by the

assignees of her husband, the Court directed the Master to have regard to the extent of the fortune received by her husband in her right, as well as to any other settlement which he might have made on her. [*Green v. Otte.*] - - - - - 250

2. Settlement of a sum of money upon trust to be transferred to the surviving parent for the benefit of him or her and any child or children of the marriage; held, upon construction of the whole instrument, that the surviving parent took for life, with remainder to the children. [*Chambers v. Atkins.*] - - - 382
3. Voluntary settlements of personal property made by persons who are not indebted at the time, are good against a subsequent purchaser for valuable consideration. [*Jones v. Croucher.*] - - - - - 315
4. See TRUST, 3-5.

SEQUESTRATION.

See PRACTICE, 24.

SOLICITOR AND CLIENT.

1. The Court has no jurisdiction to order a solicitor's bill to be taxed, on the application of the solicitor himself. [*Sayers v. Walond.*] - 97
2. A solicitor who had refused to act any longer for a party in the cause, was ordered to permit the party to inspect papers in his possession, at all reasonable times, without any undertaking on her part to proceed

- to a taxation of his bill. [*Moir v. Mudie.*] - - - - - 282
3. A solicitor who refused to allow a deed in his possession to be proved on behalf of the plaintiff, because he had a lien on it for costs due from the defendant, was ordered to produce the deed at his own expense, and to pay all the costs consequent on his refusal. [*Brassington v. Brassington.*] - - - - - 455
4. See DEED, 1.

SPECIFIC PERFORMANCE.

1. Specific performance of an agreement to grant a building lease, decreed generally, although the plaintiff had built a brewhouse upon part of the land comprised in the agreement, and thereby injured the adjoining property of the lessor. [*Gorton v. Smart.*] - - - - - 66
2. Specific performance decreed of an agreement to sell the good will of a trade, and the exclusive use of a secret in dyeing. [*Bryson v. Whitehead.*] - - - - - 74
3. Where damages in an action at law for breach of a contract to sell a chattel would be an insufficient remedy for the purchaser, although a sufficient remedy for the vendor, a demurrer to a bill by the vendor for a specific performance will be overruled, because the remedy in this Court must be mutual for purchaser and vendor. [*Withy v. Cottic.*] - - - - - 174
4. Where the answer to a bill for a specific performance raises any other objection to the performance of the contract besides defects in the title, on a motion for a reference of the title to the Master, after the answer has come in; *semble*, that the Court will not examine whether the other objection be frivolous or not, because that is matter to be decided at the hearing of the cause. - 174
5. *Semble*, that the Court will not, on motion, decide upon the validity of any other objection, besides defect of title, which may be raised by the answer to a bill for specific performance, the consideration of any other objection being matter to be reserved till the hearing of the cause. [*Gordon v. Ball.*] - - - 178
6. The Court refused to decree the specific performance of an agreement to purchase the fee simple of certain lands, and also the right to impound the water of a river, and to divert from it a stream of water, because the vendor, though seised in fee of the lands, had only a lease for 99 years of the other subjects of the contract, and had not, as against some of the proprietors of land on the banks of a river, a right to divert the water, the purchaser having entered into the contract for the purpose of erecting a manufactory to be wrought by the water, and twelve years having elapsed between the time of the agreement and the hearing of the cause. [*Wright v. Howard.*] - - - 190

7. Bill for specific performance of an agreement to take a lease for 42 years of iron and coal mines and machinery for the purpose of trade, dismissed, on account of delay on the part of the lessor to make out his title and to give possession at the time stipulated in the agreement. [*Parker v. Frith.*] - - - 199

8. Bill will lie for the specific performance of a contract for the purchase of government stock, where it prays for the delivery of certificates which give the legal title to the stock. [*Doloret v. Rothschild.*] - - 590

9. Time is of the essence of a contract, where the subject of the contract is of such a nature as to be exposed to a daily variation in its value. - - - - - 590

10. Specific performance decreed at the suit of the vendor of a contract for the sale of debts proved under a commission of bankrupt. [*Adderley v. Dixon.*] - - - - 607

11. See AGREEMENT.—PARTNERSHIP, 4.

STOCK.

A sum of money in the funds, standing in the name of two trustees of a friendly society one of whom had absconded, ordered to be transferred by the other trustee into his own name jointly with that of another trustee elected in the room of him who had absconded. [*In the matter of a Friendly Society.*] - - 82

TENANT FOR LIFE.

Tenant for life of real estates under a will having expended money in finishing a mansion-house which the testator had begun but left unfinished, and in repairing the mansion-house, which had been damaged by dry rot, the Court, in a suit for administering the trusts of the will, referred it to the Master to inquire whether it was for the benefit of all parties interested that the mansion-house should be finished, but refused an inquiry as to the repairs; and said that if it was found for the benefit of all parties interested that the mansion-house should have been finished, the Court would, if there were no personal estate applicable, direct the expense to be a charge on the real estates. [*Hibbert v. Cooke.*] - - - - - 552

TERM OF YEARS.

An injunction to restrain the setting up of an outstanding term in bar of an ejectment, will not be granted upon motion. [*Barney v. Luckett, Northey v. Pearce.*] - 419, 420

TESTIMONY, (BILL TO PERPETUATE.)

1. A demurrer will hold to a bill to perpetuate testimony, if it do not state that no action can be immediately brought. [*Angell v. Angell.*] 83

2. The Court will not order copies of depositions taken to perpetuate the testimony of witnesses to be delivered out for the purpose of perfecting the title to an estate, even where the witnesses are dead. [*Teale v. Teale.*] - - - - 385

TITHES.

1. At the trial of an issue to ascertain whether one of the defendants, a layman, was entitled to the tithes, or a modus in lieu of the tithes of certain lands, it was proved that a payment described as a tithe or rate-tithe issuing out of the lands in question, had been conveyed by the defendant's title-deeds for the last 150 years, and that this payment had been received by him and his ancestors, and that no tithe had been paid to the plaintiff, the rector, within living memory; and a verdict was found for the defendant. A motion by the rector for a new trial was refused. [*Williams v. Bacon and others.*] - - - - 415

TRADE.

1. A trader may sell a secret in his trade, and restrain himself generally from the use of it. [*Bryson v. Whitehead.*] - - - - 74
2. Specific performance decreed of an agreement to sell the good-will of a trade, and the exclusive use of a secret in dyeing. - - - - 74

TRUST.

1. Where an infant died seised of an equitable estate descended *ex parte maternâ*, his incapacity to call for a conveyance of a legal estate, by which the course of descent would have been broken, is not a sufficient reason to induce the Court to consider the case as if such a conveyance had actually been made; it not being, according to the terms of the trust, any part of the express duty of the trustee to execute such a conveyance. [*Langley v. Shydd.*] - 45
2. Testator gives the residue of his estate to his executors on trust, in default of appointment, to dispose of it at their pleasure, either for charitable or public purposes, or to any person or persons, in such shares, &c. as they, in their discretion, should think fit: held that the trust is too general and undefined to be executed by the Court; that the executors cannot take, because it is given expressly on trust; and that the next of kin are entitled. [*Vezzy v. Jameon.*] - - - - 69
3. G. E. conveyed real estates upon trust for the benefit of his daughter; but he declared that if she married under age, and without his consent, the trustees should hold the estates in trust for him and his heirs. The daughter married under twenty-one and without consent; but G. E. was afterwards reconciled to her, and treated both her and her husband with great kindness: held that this

conduct of the father did not divest the equitable fee which had vested in him on the marriage. [*Duffield v. Elwes.*] - - - - - 239

4. Testator gave to his wife all his personal estate, relying that if she should marry again she would secure whatever she should possess under his will, for her separate use; and he recommended her to give by her will, what she should die possessed of under his will, to certain persons whom he named: held that the wife's executor was a trustee of the whole of the property possessed by her under the will, for the persons named. [*Horwood v. West.*] - 387

5. The sole possessor of a recipe for making a medicine assigned it on the marriage of his daughter to trustees in trust for her and her husband for their lives, and directed that after their decease it should be sold for the benefit of their children. The mother destroyed the recipe and verbally communicated the contents to her eldest son for the benefit of his brothers and sisters. Upon a bill filed against him by some of the younger children he was declared to hold the secret upon the trusts of the settlement, and was decreed to account for the profits made by him by the sale of the medicine after his mother's death; and, as a sale was impracticable, an issue was directed to ascertain the value of the secret. [*Green v. Folgham.*] - - - 398

6. *Qu.* Whether the rule, that a trustee cannot purchase from his *cestui*

que trust, prevails where the relation of trustee gives no advantage? [*Naylor v. Winch.*] - - - 555

7. See WILL, 8.

VENDOR AND PURCHASER.

1. Where the conditions of sale provide that interest shall be paid from a certain day, if the purchase be not then completed, the purchaser cannot relieve himself from the payment of interest by alleging that the delay in completing the contract was caused by the vendor; but it is otherwise where there is no express stipulation. [*Esdaile v. Stephenson.*]

122

2. Quit rents being incidents of tenure, are proper subjects of compensation. *Qu.* as to rent-charges, which are not incidents of tenure, though the Court has allowed them when small to be subjects of compensation. 122

3. *Qu.* To what extent time is of the essence of the contract, where the purchase is intended with a view to commercial purposes, as to the erection of a manufactory. [*Wright v. Howard.*] - - - - - 109

4. Where payments have been made by a vendee at different times on account of his purchase, all exceeding the interest due at the times of such payments, and the decree in a suit by the vendor for a specific performance, directs an account to be taken of what is due to the plaintiff for the principal and interest in respect of the purchase, rests are

always made in taking the account.
[*Griffith v. Heaton.*] - - - 371

5. Where a devisee of real estate subject to debts and legacies, had contracted to sell the estate in order to raise money to pay the debts, and afterwards a bill was filed against her by the legatees for the administration of the testator's estates, and the purchaser consented to go before the Master upon a reference as to the title in that suit; held, that he was not thereby bound to take an equitable title, but might insist on having the same title as he might have required if a suit had been instituted against him for a specific performance of his contract; and that as two commissions of bankrupt had issued against the devisee before the contract was entered into, though neither of them was proceeded in, he was not bound to accept the title. [*Cann v. Cann.*] - 384
6. An injunction may be obtained, upon motion to restrain a purchaser under a decree, not a party to the cause, who has not paid his purchase money, from committing waste on the property purchased. [*Cannan v. Stodge.*] - - - - 381
7. Where the purchase money for an estate was, in pursuance of the agreement for the purchase, secured by the bond of the purchaser, payable at the death of the vendor, with interest; but the conveyance expressed that it had been paid, and had the vendor's receipt indorsed upon it: held, that the vendor had

no lien on the estate for the amount of the bond. [*Winter v. Lord Anson.*]

484

8. Where a conveyance is executed to a purchaser, which expresses that the purchase money is paid, the estate does not, in equity, pass by the conveyance till the purchase money is actually paid, although a receipt for the purchase money is indorsed on the conveyance. - 434
9. Where a vendor agrees to sell a real estate, in consideration of a bond for the purchase money payable at a future period, with interest in the mean time, the estate passes to the purchaser on the execution of the bond and of the conveyance, and the vendor has no lien for the amount of the bond. [*Winter v. Lord Anson.*]

434

10. A purchaser is not bound to complete his purchase, without the title deeds, unless he has a legal covenant to produce them. [*Barclay v. Raine.*] - - - - - 449

11. See MONEY, PAYMENT OF, INTO COURT, 2.—SPECIFIC PERFORMANCE.

VOLUNTARY SETTLEMENT.

See SETTLEMENT, 3.

WASTE.

If a tenant for life has rendered accounts to the remainder-man of timber cut by him during a period of more than six years before a bill is filed against him for an account of such timber and of the value of it,

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the statute of limitations cannot be pleaded to the bill; for though, if the remainder-man had brought an action of trover, the tenant for life might, notwithstanding the rendering of the accounts, have pleaded the statute, he could not have done so if the remainder-man had brought an action of assumpsit. [*Hony v. Hony.*] - - - - - 568

WILL.

1. Testatrix gave all her personal property to *E. R.*; and in case *E. R.* married and had a child or children, then to go to the heirs of *E. R.*; but in case *E. R.* should die without a child or children and leave a husband, then the interest to him for life, and four legacies of stock to certain other persons; and if *E. R.* should die unmarried, then she gave several small legacies to other persons. *E. R.* died without ever being married. Held, that the gift to *E. R.* was subject, in one event, to the legacies of stock, and, in another event, to the small legacies; and that, in the event which happened, the legacies of stock failed, but the small legacies took effect. [*Swayne v. Smith.*] - - - - - 56
2. Where real estates were devised in strict settlement, subject to a trust for raising portions for younger children during the minority of the tenant for life, out of the rents and profits, or by sale or mortgage: held, that certain funds which had arisen from the rents during the

minority of the tenant for life, were applicable to the payment of the portions, and that the deficiency only could be raised by sale or mortgage. [*Warter v. Hutchinson.*] 276

3. *N. H.*, by will, gave 800*l.* out of the money to be produced by the sale of her real estates to trustees for the benefit of certain charitable institutions, and she gave the residue of the money to *J. R.* The gift of 800*l.* being void, her heir is entitled to it, and not *J. R.* [*Jones v. Mitchell.*] 290

4. Where the decree referred it to the Master to inquire whether a testator left any relations of the degree of first or second cousins; held that first cousins twice removed ought to be included in the report. [*Silcox v. Bell.*] - - - - - 301

5. *I. W.* bequeathed 1,000*l.* stock to trustees, in trust to pay the dividends to his daughter whilst she remained single; and, provided she married with the consent of his trustees, he authorized them to advance to her husband such part of the stock (not exceeding one-third) as they thought proper; and he declared certain trusts of the remainder for the benefit of his daughter and her children. But if she married without the consent of the trustees, he declared certain trusts of the whole fund for the benefit of his daughter and her children. She married in *I. W.*'s lifetime, and without his consent, but he was afterwards reconciled to

- the marriage. Held, that the husband was entitled to one-third of the stock, and that the remainder was to be held upon the same trusts as it would have been had the daughter married after *J. W.*'s death, and with the trustee's consent. [*Wheeler v. Warner.*] - - - - - 304
6. Testator bequeathed to his wife the use of his furniture, &c. which he desired to be distributed among his children when the youngest attained twenty-one, at her and his executor's discretion; such part to be reserved for her use as might be thought reasonable, and at her death to be distributed as above directed. Held, that those children who died before the youngest attained twenty-one did not take vested interests. [*Ford v. Rawlins.*] - - - - - 328
7. Testatrix bequeathed one moiety of the residue of her personal estate to her daughter *Hannah*, for her separate use, during the joint lives of her and her husband; and, if she survived, to her absolutely; if not, to her children who should attain twenty-one; and she bequeathed the other moiety for the benefit of her daughter *Mary* and her children; with a bequest over, if she died without children, to *Hannah* and her children, in like manner as the first moiety. By a codicil, she bequeathed the whole residue, if both her daughters died without leaving a child who should attain twenty-one, to *A.* Both the daughters died without issue, but *Hannah* survived her husband: held, nevertheless, that *A.* was entitled to the residue. [*Hopkins v. Towle.*] - 337
8. Testator gave to his wife all his personal estate, relying, that if she should marry again she would secure whatever she should possess under his will for her separate use; and he recommended her to give, by her will, what he should die possessed of under his will to certain persons whom he named: held, that the wife's executor was a trustee of the whole of the property possessed by her under the will for the persons named. [*Horwood v. West.*] - 387
9. Where an annuity is given by will, with a direction that it shall be paid monthly, the first payment is to be paid at the end of a month after the testator's death. [*Houghton v. Franklin and others.*] - - - - 390
10. Testator devised a freehold estate to trustees, in trust to pay the rents, as the same should become due and payable, into the hands of his wife, and not otherwise, for her life, for her separate use; and directed that the receipts of his wife alone for what should be actually paid into her own proper hands, should be good discharges to his trustees: held, that the wife had power to alienate her life estate. [*Acton v. White.*] 429
11. Bequest in trust for all the children of *A.* born in testator's lifetime, includes a child of which *A.*'s wife was *enccinte* at the testator's death. [*Trower v. Butts.*] - - - 181

12. Bequest of household furniture and other household effects in a dwelling house and premises, comprises all property kept there, either for use or ornament. [*Cole v. Fitzgerald.*] 189
13. Devise to first and second cousins includes first cousins twice removed. [*Silcox v. Bell.*] - - - 301
14. A bequest of stock to trustees, upon trust to pay the dividends from time to time to a married woman, for her separate use, is an unlimited gift of the dividends, and consequently passes the capital. [*Haig v. Swiney.*] - - - 487
15. *S. H.* bequeathed the dividends of her property in the funds to *W. H.* for his life, and directed that, after his decease, the principal should be divided amongst his children in the manner aftermentioned; she then gave the children certain sums of money, which would have exhausted the whole of her funded property at the date of her will. Between that time and her death, that property had greatly increased. Held, that the executors were entitled to the surplus, as undisposed of. [*Haynes v. Littlefair.*] - - 496
16. The words "securities for money," in a will, pass stock in the funds, unless the force of the expression is controlled by the context. Whether bank stock will pass by the same words? *Qu.* [*Bescoby v. Pack.*] 500
17. Testator directed the interest of a sum of money to be paid to his sisters during their lives, in equal proportions, and at their deaths gave to their children the inheritance their mothers derived from his estate, and desired that his sisters should be the residuary legatee, in the proportions already noticed. Held, that the sisters were entitled to the residue absolutely, and that their children took no interest in it. [*Grassick v. Drummond.*] - - - 517
18. Testator, after giving some legacies, directs payments to be made to his devisees, as under; and then mentions certain persons, and the sums to be paid to them, and gives the residue to all his devisees above mentioned in proportion to their legacies. Every one of the legatees is entitled to a share. [*Coope v. Banning.*] - - - 534
19. Devise of lands to trustees, upon trust to pay one moiety of the rents to devisor's wife, for her life, and the other to his only son; and after his wife's death to convey to his son in fee; but if his son died without issue in the wife's life, to convey to devisor's nephew in fee. The son died without issue in the wife's life. She is not entitled for life, by implication, to the moiety devised to the son. [*Aspinall v. Petvin.*] - - 544
20. Testator gave his son an absolute interest in one-fourth of his personal estate; but, by a codicil, he directed that his son's share should be only for the life of himself and his wife, provided they had no issue, and that, at their death, it should fall into the residue: Held, that the son did not

take absolutely, but subject to an executory bequest over, in case there was no issue of himself and his wife living at the death of the survivor. [*Rackstraw v. Vile.*] - - - 604

WITNESS.

1. Where a witness left London before the forty-eight hours were expired, the party producing him was ordered to bring him back at his own ex-

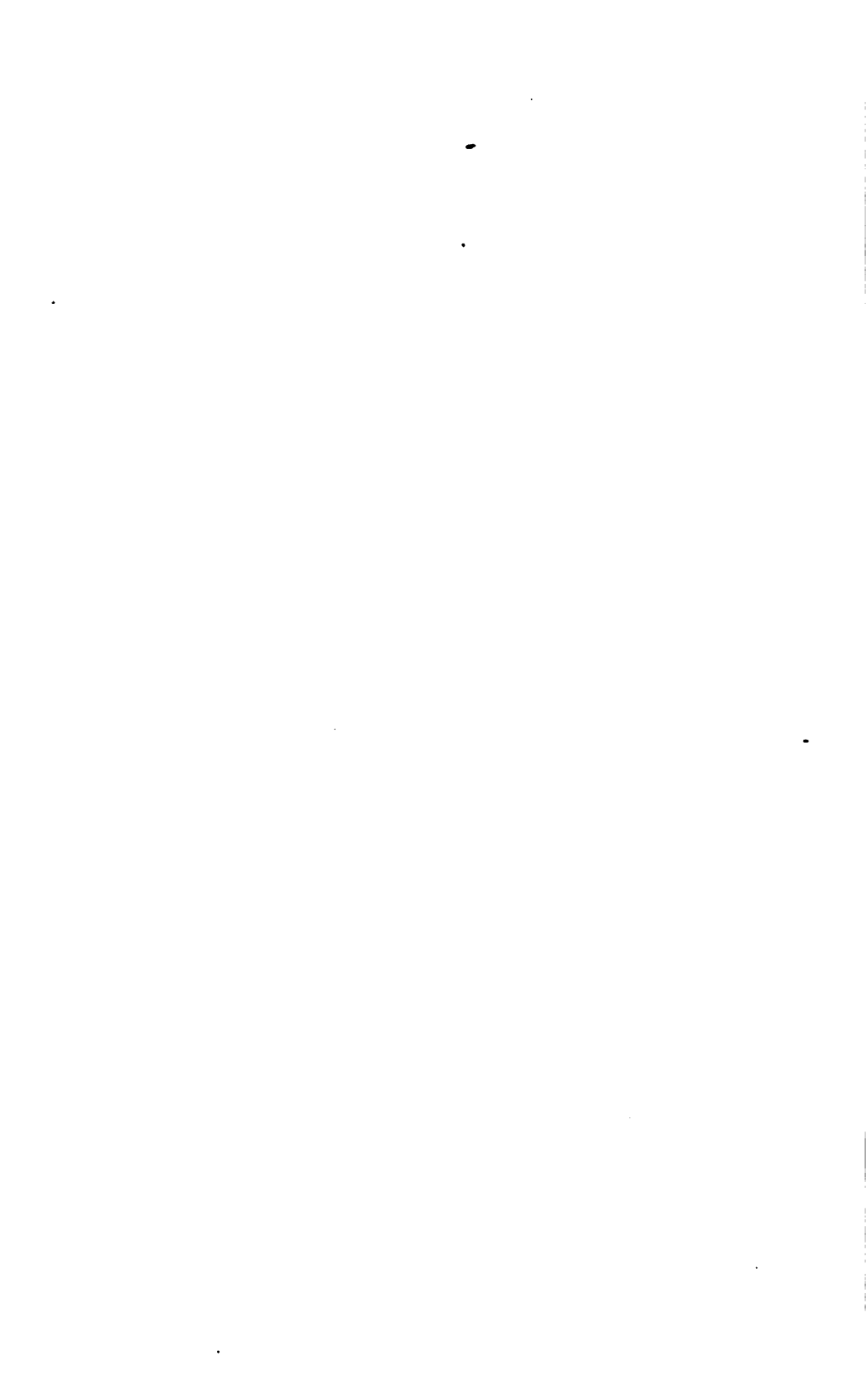
pense, or the examination in chief to be suppressed. [*Whittuck v. Lysaght.*] - - - - - 446

2. There is no precise time beyond which witnesses cannot be discredited. Interrogatories in support of articles for that purpose may relate to particular facts not in issue in the cause, as well as to the credit of the witnesses generally. [*Piggott v. Croxhall.*] - - - - - 467
3. See PRACTICE, 37.

END OF THE FIRST VOLUME.

ERRATA.

- Page 93, line 19 in note, *for* "as Bills" read "as to Bills."
- 146, line 23, after the words "to pay into Court the" read "whole sum of 22.325 l. 10s. 2 d." and *delete* all that follows in that line and the remaining lines of the page.
- 156, line 16, *delete* the whole of this line and all the lines that follow on this page.
- 157, at the top, *delete* the ten first lines of this page.
- 471, line 24 in note, *for* "344" read "354."





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